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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

17 Cr. 548 (JMF)

5 JOSHUA ADAM SCHULTE,

6 Defendant.

Conference

7 -----x

8 New York, N.Y.  
9 December 20, 2021  
2:30 p.m.

10 Before:

11 HON. JESSE M. FURMAN,

12 District Judge

13 APPEARANCES

14 DAMIAN WILLIAMS

15 United States Attorney for the  
Southern District of New York

16 BY: DAVID W. DENTON JR.

Assistant United States Attorney

17 SABRINA P. SHROFF

18 DEBORAH A. COLSON

Standby Counsel

19 Also Present: Daniel Hartenstine, CISO

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(Case called)

MR. DENTON: Good afternoon, your Honor. David Denton, for the government.

THE COURT: Good afternoon, Mr. Denton.

THE DEFENDANT: Josh Schulte, appearing *pro se*.

MS. SHROFF: Good afternoon, your Honor. Sabrina Shroff and Debra Colson, standby counsel.

THE COURT: Good afternoon to all of you. Welcome back.

Thanks for adjusting to the new courtroom. I thought a larger courtroom would allow everybody to socially distance, as prudent, given the alarming rise in the new variant around us.

A reminder. We are in an unclassified setting, so please restrict yourself and ensure that you don't say anything revealing classified information. A heads-up, going forward, you should let me know in advance of a conference if you anticipate that there would be a discussion or need to be a discussion of anything classified that would allow us to make the necessary arrangements both for a court reporter who is cleared and also a courtroom in which we can have such discussions. So just a reminder about that, but for today's purposes, please make sure that you restrict your comments.

Mr. Schulte's preconference letter at ECF-644 requested an audio call-in line for his family to listen. I'm

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1 certainly sympathetic to that request, but I'm constrained to  
2 deny it. Under Rule 53, the Court is not permitted to allow  
3 live broadcasting from the courtroom. Courts were authorized  
4 to basically provide for an exception to that when access to  
5 the courthouse was limited during Covid, but we've been advised  
6 that that is no longer the case, and so the rule must be  
7 complied with, and therefore, I can't provide for live  
8 broadcasting.

9           There have been a lot of filings, suffice it to say,  
10 and I plan to cover a lot of ground today, so I'm going to  
11 start with some case management-related matters, then turn to  
12 conditions of confinement issues and then the substantive  
13 motions. We'll take breaks as needed, and certainly if the  
14 court reporter needs me to take a break for her sake, I will  
15 certainly do so.

16           I will make one request, and this is more directed to  
17 you, Mr. Schulte, than anyone else. I don't begrudge you  
18 filing things. You obviously should file whatever you think is  
19 appropriate, but there's a lot of repetition in your filings.  
20 For instance, some of the things related to discovery issues or  
21 conditions of confinement are not just repeated but often  
22 repeated verbatim from one filing to another. I assure you I  
23 will read everything you file. I will deal with everything you  
24 file. You don't need to repeat it. You can incorporate it by  
25 reference. You can make reference to a prior filing, but it's

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1 burdensome enough without doing that to make me read things  
2 two, three, four times. It will simply make my job more  
3 difficult and make it more difficult for me to give you rulings  
4 in a timely fashion, so I would ask you to try and refrain from  
5 doing that and be as concise as you can.

6 One preliminary matter.

7 Mr. Denton, unless you tell me that Judge Crotty  
8 complied with the Due Process Protections Act previously, I  
9 didn't see anything on the docket that reflected that, I  
10 thought I should just address that.

11 MR. DENTON: Yes, your Honor.

12 We saw the Court's order today. I've reviewed it.  
13 I'm sure Mr. Lockard has as well. He's not here today.

14 THE COURT: All right.

15 The Due Process Protections Act was an act passed last  
16 year that requires me to remind the prosecution of its  
17 obligations, under *Brady v. Maryland* and its progeny, to  
18 disclose to the defense all information, whether admissible or  
19 not, that is favorable to the defendant, material either to  
20 guilt or to punishment and known to the prosecution. The  
21 prosecution must make good faith efforts to disclose such  
22 information to the defense as soon as reasonably possible.  
23 Failure to do so may result in any number of consequences,  
24 including a continuance, sanctions, dismissal, or vacatur of a  
25 conviction.

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1           As Mr. Denton just noted, I've entered a written order  
2     in compliance with the law, which is codified at Rule 5(f), and  
3     that describes more fully the government's obligations and the  
4     possible consequences of violating it. So, Mr. Denton, thank  
5     you for confirming that you've read it. Please ensure that  
6     Mr. Lockard does as well. We will be discussing some related  
7     issues today, but I trust that you will comply with the  
8     obligations and have done so to date.

9           With that, let's get started. Again, we'll start with  
10    case management issues.

11          Mr. Schulte filed a motion for quote/unquote missing  
12    discovery, and the government has responded to that. Based on  
13    the government's response, I'm persuaded that most of the  
14    issues raised by Mr. Schulte in his letter are without merit  
15    and don't require further discussion. In particular, the  
16    issues relating to Google emails, the Verizon subpoenas and  
17    returns, discovery indexes and the AFD reports and analyses.

18          There are a couple of things as to which the  
19    government said it would follow up. One is lost drives with  
20    forensic productions 6, 9 and 12. Second is the extracted copy  
21    of the so-called root volume.

22          Mr. Denton, as to those, I would be inclined to have  
23    you provide an update to me and obviously Mr. Schulte as well  
24    within a couple weeks.

25          Does that seem reasonable?

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1 MR. DENTON: Yes, your Honor.

2 THE COURT: All right. Why don't you do that, let's  
3 say, by January 5.

4 Mr. Schulte, anything you wish to say about any of  
5 those items?

6 THE DEFENDANT: I guess I never received anything from  
7 the government in response to the Verizon, Google or any of  
8 those issues yet, so I don't know what the -- if I should just  
9 wait and then review those and then respond to the Court, or --

10 THE COURT: Meaning, you haven't gotten the  
11 government's response, which is ECF No. 647, is that correct?

12 THE DEFENDANT: That's correct. I haven't been  
13 receiving government responses. It takes, like, two to three  
14 weeks.

15 THE COURT: All right. That's one of the items on my  
16 agenda.

17 You'll get it in due course, but quick summary,  
18 apparently with respect to the Google search warrant returns,  
19 some of them were provided in unclassified discovery and some  
20 was in classified discovery, and that may explain why you  
21 haven't located all of it; there are no further records with  
22 respect to Verizon to be produced; and the other items that are  
23 also addressed here, the government takes the position that it  
24 has no obligation to provide you with an index, but it is going  
25 to do so anyway; it is exploring the matter of the root volume

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1 with the FBI and also looking into the three missing drives at  
2 the MDC, and those are the two issues that I want the  
3 government to provide an update on no later than January 5; and  
4 reiterates that the items that you have raised several times  
5 with respect to purported discovery, as a matter of fact, *Brady*  
6 material -- namely, the AFD reports or analyses -- no such  
7 documents exist.

8 I accept that representation. Obviously, if it turns  
9 out to be otherwise, then the government will have some  
10 answering to do, but I have no reason to question that  
11 representation. Again, I assume you'll get that in due course.

12 Mr. Denton.

13 MR. DENTON: Your Honor, if I may, could we ask until  
14 January 7 to provide that update? I think with the holidays  
15 and everything it may help to have the benefit of that week.  
16 If there is an opportunity to provide a response sooner, we  
17 certainly will.

18 THE COURT: Sure. I'll give you until the 7th.

19 One related matter, in Mr. Schulte's preconference  
20 letter at ECF-644, he requests an updated version of the  
21 electronic version of the docket basically on a month-by-month  
22 basis. Mr. Denton, that seems reasonable enough, since  
23 presumably it's the most recent things that are most relevant.  
24 Any objection to making provision to do that?

25 MR. DENTON: So, your Honor, I'm not entirely sure.

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1 When we did this the last time, we had to work with Judge  
2 Crotty's deputy and the clerk's office because there's not a  
3 batch way to download an entire electronic docket. To the  
4 extent that what the defendant wants is just PDF copies of  
5 things, we can certainly do that relatively easily, but there  
6 was just a little bit of a delta with how we did it the last  
7 time that made it a little more complicated.

8 THE COURT: All right. You guys are regularly  
9 communicating about case management-type things, is that  
10 correct?

11 MR. DENTON: We have been, your Honor, and we have  
12 another call scheduled for next week, so we should be able to  
13 work that out.

14 THE COURT: Great. Why don't you put that on the  
15 agenda as long as -- I think Mr. Schulte is certainly entitled  
16 to have in some usable fashion what has been filed in the case,  
17 and whether that is -- I'm not sure I care what form it takes,  
18 but I think if his desires on that front can be accommodated,  
19 then we should try to do that. OK?

20 Mr. Schulte.

21 THE DEFENDANT: Yes. I just wanted to respond to that  
22 there is no more communications between the parties due to the  
23 government's insistence on recording and using --

24 THE COURT: I'm going to get to that in short order.

25 THE DEFENDANT: OK.



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1           THE COURT: All right. Also on discovery, one quick  
2 word on the government's letter regarding the search warrant --  
3 that is, the March 2017 search warrant, ECF No. 625 --  
4 Mr. Denton, suffice it to say I'm not happy about the apparent  
5 failure to produce that document and others earlier, but I fail  
6 to see that any prejudice resulted given that that search was  
7 not executed, meaning the search was not executed in response  
8 to that warrant and so, too, with respect to the other  
9 documents.

10           That being said, I don't know if you have any update.  
11 You said that you expected to have an update within a week or  
12 two. I think it's been more than a week or two, so any update  
13 on that front?

14           MR. DENTON: Your Honor, we are planning, consistent  
15 with the Court's order, to provide an update in writing later  
16 this week. The bottom line is that we believe that everything  
17 is there, that we have complied with providing the returns that  
18 are there. Again, these are warrants for which there were not  
19 returns to be produced, but we are mindful of the Court's  
20 concern and of our obligations and are reviewing carefully to  
21 make sure that nothing was missed. That's a little bit complex  
22 in this case because of the technical nature of some of the  
23 data, so making an accurate comparison with what's in the file  
24 with what was produced in discovery takes a little more work  
25 than just looking at a few things side by side. We're

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1 optimistic to be able to provide a positive report to the Court  
2 as scheduled.

3 THE COURT: All right. Very good.

4 With respect to mailing delays and filing issues,  
5 Mr. Schulte has mentioned in a couple of filings I just  
6 mentioned a moment ago that there are significant delays in his  
7 receipt of orders and government filings, and I gather that is  
8 since the MDC has stopped delivering the mail, and he requests  
9 that I order the government to revert to that practice and  
10 ensure delivery within one to two days.

11 Mr. Denton, I don't know if you have any thoughts on  
12 this front, but I do think that ensuring timely delivery of  
13 things to Mr. Schulte is really essential to keeping this case  
14 on track and proceeding in an orderly fashion.

15 MR. DENTON: Your Honor, we certainly understand that.

16 As far as what the U.S. Attorney's Office has been  
17 doing, whenever there is a government filing or a court order,  
18 we have ensured that it is mailed to Mr. Schulte either the  
19 same day or no later than the following day. I gather that  
20 there is a bit of a discrepancy between what Mr. Schulte is  
21 reporting about how frequently mail is either delivered to him  
22 or picked up from him and what the Bureau of Prisons mail logs  
23 and records show. It certainly does take him time to receive  
24 orders and filings through the U.S. mail. There's no question  
25 about that. It has to be transported, delivered, inspected,

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1 etc., but I'm not sure that there is a more efficient way to go  
2 about it, given that it is, in some respects, equally  
3 problematic to be ordering BOP legal personnel to make personal  
4 deliveries for him and not for other defendant. So this is the  
5 solution that had been come to.

6 THE COURT: I'm not sure I understand what the  
7 solution you're referring to is.

8 MR. DENTON: Well, your Honor, I think it is that both  
9 the government and standby counsel assumed responsibility for  
10 delivery within their power. In the government's case, that is  
11 to mail it to him. We have talked extensively with the Bureau  
12 of Prisons about making sure things are marked appropriately so  
13 that they are delivered as legal mail as quickly as possible.  
14 Again, I'm not entirely sure from the government's side what  
15 more there is that we can do here.

16 THE COURT: Can I ask you a question first, and then  
17 I'll hear from standby counsel and Mr. Schulte.

18 Given that Mr. Schulte is coming to the SCIF on a  
19 regular basis, is there not a means by which to essentially  
20 ensure that he receives whatever has been filed in the prior  
21 few days or prior week when he's here? In other words, that  
22 should seemingly ensure that he receives things no later than  
23 seven days and presumably less than the period of seven days  
24 after they've been filed. Is that not an option?

25 MR. DENTON: That's certainly an option, your Honor.

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1 I think to the extent that's an option the Court would pursue,  
2 the appropriate course would be for standby counsel to print  
3 those things and provide them to him. We can't mail things to  
4 the courthouse SCIF, so that would otherwise require us to make  
5 a weekly delivery from the government. I'm not sure that  
6 that's any more efficient than simply having standby counsel  
7 perform that task.

8 THE COURT: OK.

9 Ms. Shroff or Ms. Colson, I don't know if you have any  
10 thoughts or suggestions here.

11 MS. SHROFF: Your Honor, may I?

12 THE COURT: Can you put the microphone closer.

13 MS. SHROFF: Sure.

14 Your Honor, as far as Ms. Colson and I are concerned,  
15 when Mr. Schulte is produced in the SCIF, he is given an  
16 updated printout of the ECF and the documents that are  
17 attached.

18 I just want to take a minute and note for the Court  
19 that the MDC getting mail from the United States Attorney's  
20 Office is a wholly different thing than the MDC getting mail  
21 from either Ms. Colson or my office. I think it's far more  
22 expeditiously received and processed when it is coming from the  
23 United States, so I think there is a real difference between  
24 who the sender is and how quickly that mail is processed.

25 Also, I don't think Mr. Denton needs to be concerned

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1 about there being a caveat or a different way that Mr. Schulte  
2 is getting his mail as opposed to everybody else in the MDC's  
3 getting mail. Mr. Schulte is not like everybody else in the  
4 MDC. He is representing himself *pro se*, so the same rules  
5 should not apply to him that apply to all of the other people  
6 who are not going *pro se*.

7 Now, of course, at that time people going *pro se* at  
8 the MDC, all ten of them, should be treated the same way  
9 Mr. Schulte's being treated because, after all, he is the  
10 lawyer, and we are in a really big bind here, your Honor,  
11 because Mr. Schulte's quite adamant that we are merely standby.  
12 And according to Mr. Schulte, the definition of standby is that  
13 we stand by until he directs otherwise.

14 So to the extent we're able to send him mail, and we  
15 do every single time a memorandum or an order is issued or a  
16 filing is done, he gets the mail. We give him the mail both by  
17 snail mail, where we mail it, and we give it to him in the  
18 SCIF. That is what we have been doing.

19 Of course, if the government is willing, they can  
20 certainly print out their filings and leave them for us, let us  
21 know, or even leave them outside the SCIF, because they are  
22 certainly not classified or anything other than on the docket.  
23 That's all I can tell you about the mailing. We do it, as you  
24 have ordered us, within 24 hours of something hitting the  
25 docket.

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1 THE COURT: OK. But what about my suggestion of just  
2 ensuring that he receives whatever was filed in the prior X  
3 days each time he comes to the SCIF; wouldn't that be a  
4 backstop and ensure that he gets thing in a timely fashion?

5 MS. SHROFF: We absolutely do it every single time.  
6 Every single time there is a filing, unless it's he who has  
7 done the filing, we give it to him. We also give him an  
8 updated docket. If he came to the SCIF, for example, on  
9 December 1 and the next time he comes is on December 7, then we  
10 give him the printout of the docket from December 1 to December  
11 7. If one of us is not there in the SCIF -- so if Ms. Colson  
12 and I are not the people on SCIF duty, so to speak -- we let  
13 him know what has been filed, and we ensure that the filing is  
14 delivered to him by whoever's at the SCIF.

15 THE COURT: OK. But how do I reconcile that with his  
16 claim that he sometimes doesn't get things for a couple weeks?  
17 That doesn't seem reconcilable.

18 (Counsel and defendant conferred)

19 MS. SHROFF: So, Mr. Schulte, I think -- I don't think  
20 this is correct, but I think that it's possible that there are  
21 days that the person who is at the SCIF is not somebody that is  
22 with either my office or Ms. Colson's office; he's simply a  
23 cleared person, and he doesn't have any access, as we have  
24 repeatedly told the government, to an office, ability to scan,  
25 ability to email. But there might be an off chance where that

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1 person is doing SCIF duty, so to speak, and there is a lag of  
2 some sort. But as far as I know, that is not a frequent  
3 occurrence, because one of us tries to come down and give the  
4 paperwork and then go back and leave.

5 THE COURT: And you're representing that you print out  
6 both the docket record of what has been filed since the last  
7 SCIF session as well as a copy of any order or filing other  
8 than Mr. Schulte's own filings. Is that correct?

9 MS. SHROFF: Yes. But may I just confirm with  
10 Ms. Colson?

11 THE COURT: Yes.

12 MS. SHROFF: Your Honor, thank you.

13 I did confirm with Ms. Colson, and that is correct,  
14 the date hypothetical I gave you. If the last time I printed  
15 out the docket for him was December 10, then I would print out  
16 the docket from December 10 until today, which is December 20.

17 THE COURT: Just the docket or also the documents?

18 MS. SHROFF: No, no. The docket and the documents.  
19 Both certainly, your Honor. And also, Ms. Colson and I think  
20 that, we also print out -- we have parrot records. So if he  
21 has filings in the Court of Appeals, we print out the actual  
22 docket and the document. But there may be a time, like what  
23 happened, I think, a week ago, when Mr. Schulte wasn't brought  
24 to the SCIF because of the problems with, I think it was the  
25 Maxwell trial, or for whatever reason, there could be a time

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1 where there is a filing on a Tuesday, but he's not brought to  
2 the SCIF until the following week, the Tuesday, in which case  
3 he would have more than a week where he gets nothing.

4 THE COURT: OK. But it seems to me that if you both  
5 are complying with the direction to mail things within 24 hours  
6 and he's being provided with copies each time that he comes to  
7 the SCIF, that more or less ensures that he will get things  
8 within a couple of days of them being filed in every instance.  
9 Am I missing something?

10 MS. SHROFF: I don't think -- I'm not sure whether the  
11 Court is missing something or there is a disconnect. But I do  
12 say this to the Court. There seems to be a significant delay  
13 with MDC giving mail to those people in the SHU. To the extent  
14 that he's coming to the SCIF, we update him and I again have  
15 confirmed with Ms. Colson that we print out and we give him  
16 whatever filing has been made. But if there's a filing, for  
17 example, that hits the docket at 4:45 and he's been in the SCIF  
18 on that Tuesday and he's gone, then he doesn't get that until  
19 the next time he shows up in the SCIF, which could be a week  
20 from that Tuesday.

21 That is why I think it would be very helpful if the  
22 government had some kind of mechanism by which the MDC actually  
23 processes the mail that the government sends him. There is a  
24 distinction between their mailing address and our mailing  
25 address, and I'm sure the Court knows that.



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1 THE COURT: All right.

2 Mr. Denton, I'm going to ask you to look a little bit  
3 into this and to include it in the January 7 letter, and by  
4 this I mean I certainly agree with you that Mr. Schulte  
5 shouldn't get any special treatment, but I think Ms. Shroff is  
6 not wrong in saying that a defendant who is representing  
7 himself or herself has a different need to receive things in a  
8 timely fashion than another inmate, because the fact of the  
9 matter is it's not just his interest, it's also my interest in  
10 ensuring that this case proceeds in a timely and efficient  
11 manner, and if he's not receiving things in a timely and  
12 efficient matter, it makes it very difficult for the case to  
13 proceed in that way.

14 What I would ask is for you check with MDC legal and  
15 figure out if there is an efficient means to deliver things  
16 more quickly to defendants who represent themselves and for you  
17 to report back to me about that, and in connection with that  
18 report, I'd actually like a number of how many defendants are  
19 similarly situated in the MDC, how many are representing  
20 themselves for whom this would be an issue, so I have a sense  
21 of what the burden would be on the MDC. All right?

22 MR. DENTON: We understand, your Honor.

23 I will say we have communicated about this extensively  
24 with the MDC and we have conveyed the Court's concerns about it  
25 and noted this particular concern about the defendant's *pro se*

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1 status. To Ms. Shroff's point, we have been marking mail as  
2 legal mail from the U.S. Attorney's Office to try and expedite  
3 that. We'll see what else we can do.

4 THE COURT: OK. And you should tell them that if they  
5 want to avoid a more burdensome order, they may want to come up  
6 with a practical solution themselves.

7 Yes, Ms. Shroff.

8 MS. SHROFF: Your Honor, I believe I could be wrong,  
9 because I don't remember if this was fully out there, but as I  
10 understood it, I think Judge Crotty kind of tried to help us  
11 all out and said that perhaps MDC legal would just receive the  
12 filings via email, print it out and give it to Mr. Schulte.  
13 Ms. Colson reminds me of that, but I think that's what Judge  
14 Crotty may have ordered, but I'm not really sure whether MDC  
15 would agree with it or not, but that's another solution.

16 THE COURT: Sure.

17 MS. SHROFF: I finally want to note one thing.

18 I'm not able to give Mr. Schulte something. Right?  
19 So I go to the SHU. I can sit down and talk to Mr. Schulte,  
20 but even if I represent to them -- and I've tried this with  
21 another client; I think that client was before you,  
22 Mr. Mercado -- I'm not able to hand up any legal paperwork to  
23 somebody who's in the SHU, no matter -- even if it's just the  
24 docket. So the best I can do is go to the SHU, tell him  
25 there's a 40-page filing, and then come back downstairs and

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1 just throw it in the legal mailbox. I'm not able to  
2 hand-deliver; I just wanted you to know that. If that were an  
3 option, I suppose we would undertake it.

4 THE COURT: Is that true in the SCIF as well? Can he  
5 receive something in the SCIF and then take it back to the MDC?

6 MS. SHROFF: He can take it back to the MDC only if  
7 it's unclassified.

8 THE COURT: Obviously.

9 MS. SHROFF: Well, I know. I'm just trying to answer  
10 you completely. If it's just a filing, then he can take it  
11 back, yes.

12 THE COURT: OK. So, again, it doesn't seem like this  
13 should be a problem, and I'm not quite sure I understand why it  
14 is a problem, given the various backstops that we have. That  
15 being said, I do want Mr. Denton to discuss it with MDC and try  
16 and figure out if there is a more efficient means of delivering  
17 it to him than the current system. So I'll expect to hear back  
18 from the government on that.

19 Mr. Schulte, anything you wish to say?

20 THE DEFENDANT: Yes. There's been a bunch said.

21 For the first thing, so about the standby counsel and  
22 delivering things to the SCIF, so, for example, last week, I  
23 didn't get anything, so the last thing I got from them was  
24 December 8, and that's because the specific person who was  
25 there that last week was not able to bring me things. And so

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1 that's the biggest issue. So whenever that happens, it could  
2 be several weeks before I get something from them, and they've  
3 been basically providing things to me as a nice to-do, but it  
4 hasn't been, as far as they are concerned, it's not an order  
5 from the Court, so I've been primarily relying upon the  
6 government. And the government says that the mail delays  
7 aren't like I claim them to be because of some logbook. I  
8 haven't seen that, but I do have here -- envelope that was  
9 marked November 15. It was received by MDC November 23, and it  
10 was delivered to me November 29. And this is the quickest I've  
11 gotten things, so that's 14 days there. That's just on the  
12 envelope. It's clearly signed by the person.

13 THE COURT: All right. Mr. Schulte, Mr. Denton is  
14 going to look into it. I think if we can come up with a more  
15 efficient delivery system to the MDC, we should. And I  
16 recognize there will be occasions where things don't work in a  
17 well-oiled manner, but it sounds like, with various backstops,  
18 we have a system in place that should ensure you get things in  
19 a timely fashion, and we'll go from there.

20 Anything else on this?

21 THE DEFENDANT: Yeah. I think that's -- I guess I  
22 just wanted to -- they mentioned something about Judge Crotty's  
23 orders before, so I just wanted to clarify that, that in Dkt.  
24 515, Judge Crotty denied my motion to compel the MDC to deliver  
25 mail promptly, and it was on the condition that the government

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1 followed the old procedures, that it delivers -- it mails stuff  
2 to the MDC, then they give it to me within one to two days.  
3 That was Judge Crotty's ruling from Dkt. 515.

4 THE COURT: All right. Thanks for alerting me to  
5 that.

6 The next item has to do with Mr. Schulte's request to  
7 file things via CD, which I guess he would deliver to the MDC.  
8 I'm not quite sure how it would work, but Mr. Denton, anything  
9 you wish to say on that front? As far as I can tell,  
10 Mr. Schulte's not having any problem filing things, since he  
11 seems to file things on a nearly-daily basis, but be that as it  
12 may, what's your thought.

13 MR. DENTON: Your Honor, we share that impression.  
14 I'm not entirely sure what the plan would be for a CD after it  
15 gets delivered to the MDC whether it would be mailed to the  
16 Court or whatnot. But I will say, I think, fundamentally we do  
17 not have an issue with however the Court prefers to receive  
18 filings from the defendant.

19 THE COURT: Mr. Schulte, do you want to explain  
20 exactly what you're proposing?

21 THE DEFENDANT: Yes, and just to be 100 percent clear  
22 on this, most of the times I can have standby counsel file  
23 things when I move to the SCIF, and the biggest problem here is  
24 when the Court has deadlines, so if the deadline's on a  
25 Thursday, but I don't -- I only have a SCIF day on Monday,

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1 Tuesday, there's no way -- unless I file it early, there's no  
2 way to specifically meet the court deadline. And so the DVD/CD  
3 filing was basically proposed simply to go the opposite way of  
4 the way the government had been delivering things to me. It's  
5 simply I have the DVDs, blank DVDs that I simply put the PDF on  
6 to be filed. I give it to MDC, one of the corrections  
7 officers. They simply give it to unit, unit team there, and  
8 then legal either mails it, sends it by email and just attaches  
9 an email to send it to either standby counsel or the  
10 government, or whoever, and then it gets ECF-filed from there.  
11 That way, I can meet court deadlines on specific dates, and  
12 things like that.

13 THE COURT: All right. Gotcha. OK. I am not going  
14 to go that route. That seems like a recipe for disaster and  
15 creating more problems than solutions.

16 I think, instead, what would make sense is if you know  
17 what days you have things due -- first of all, my hope is that  
18 there will be fewer deadlines going forward in the sense that  
19 there will be fewer filings going forward. But be that as it  
20 may, if you think that there's a disjuncture between the days  
21 you'll be in the SCIF and a deadline for filing is a couple  
22 days after you'll be in the SCIF, if you want to file a letter  
23 just requesting permission to file two days later, when you  
24 anticipate you'll be in the SCIF, I'm certainly happy to make  
25 that accommodation for you to make things easier. That seems

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1 like an easier system than the one that you're proposing.

2 Next on my list is handling of filings by standby  
3 counsel. I really don't quite understand. This is an issue  
4 that the government raised in its preconference letter. I also  
5 think that there have been issues over time with respect to  
6 filings that may contain classified information. I'm going to  
7 be deliberately vague on that front. Honestly, I do not  
8 understand why I need to be involved in this. This seems like  
9 something that counsel should be able to deal with  
10 professionally and in good faith.

11 I have reviewed Judge Crotty's September 23 order at  
12 ECF No. 518, and it seems pretty clear to me what standby  
13 counsels' responsibilities are with respect to filings, and  
14 also it's very clear to me that that order does not apply to  
15 filings that may contain classified information which are  
16 governed by the protective order, which, at present, is at ECF  
17 No. 61, though there may be one that supersedes that order in  
18 due course, all of which is to say I don't quite understand  
19 what the issue is. It seems like the duties and  
20 responsibilities of standby counsel are pretty clear and don't  
21 require any clarification.

22 But, Ms. Shroff or Ms. Colson, is there something I'm  
23 missing here? Is there some reason that I need to even be  
24 discussing this?

25 MS. SHROFF: Well, your Honor, I don't know. We went

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1 through an entire trial and managed to survive it, and I'm not  
2 sure exactly what has changed. Judge Crotty's order gives us  
3 the option of informing the government that they have mail and  
4 they should pick it up, and that is what we do. And that is  
5 largely because, and I reiterate again, that there are SCIF  
6 days during which neither Ms. Colson nor I are physically here.  
7 We simply have a cleared paralegal, who is required to stay  
8 alongside Mr. Schulte. So when Mr. Schulte informs him that  
9 there is a missive or a letter or a filing, they call the U.S.  
10 Attorney's Office and leave a message, and the U.S. Attorney's  
11 Office, who has quite, I would say triple, at least, the number  
12 of employees that Mr. Schulte has, we ask them to come pick it  
13 up. I don't see the issue, honestly.

14 THE COURT: If you look at Dkt. No. 518, it provides  
15 for correspondence to be scanned and emailed, to be delivered  
16 to the U.S. Attorney's Office space on the fifth floor as long  
17 as staff is present to accept it and the government is to  
18 arrange for staff to be present during the regularly scheduled  
19 SCIF hours, and if staff is not present, then the burden shifts  
20 on to the government, upon notice from standby counsel, to  
21 promptly collect it. So if what you're suggesting to me is  
22 that you're relying on that, that is only if the first three  
23 options are not readily available.

24 MS. SHROFF: Right, and the first option is that we  
25 call and let them know that they have a letter and they can



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1 come pick it up. That's what Judge Crotty ordered.

2 The reason we asked for that to be included, your  
3 Honor, is because lawyers are not -- we are not there at the  
4 SCIF. He's at the SCIF for, like, hours at a time. Neither  
5 Ms. Colson nor I are there. We had to advertise for somebody  
6 to come fill that slot. We barely managed to find one person  
7 who was willing to do it, and that is why we asked specifically  
8 Judge Crotty to shift the burden, so to speak, on to the  
9 government, and that is one of the options that the judge gives  
10 us. And frankly, we're kind of worried about this scanning and  
11 emailing. It's really worked to our detriment.

12 We are not classification experts. When they first  
13 asked us to undertake that responsibility, we contacted the  
14 CISO and expressed our deep concern that we do not have -- we  
15 simply do not have -- the correct level of knowledge to decide  
16 these issues, and we would rather do what we have always done  
17 in this case, which was give the filings to the U.S. Attorney's  
18 Office, who had different lawyers at that time and managed to  
19 help us out so that there wasn't a mishap or a spill or a wrong  
20 filing, and that prophylactic was extremely helpful.

21 We would prefer very much to stick to that process  
22 because I think it reduces error, because nothing is hitting  
23 the docket, and we've discussed this several times with the  
24 CISO who is present in court today.

25 THE COURT: All right. As a general matter, my

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1 understanding, I recognize that you're not a classification  
2 expert and you're certainly not a classification authority, but  
3 it seems to me that filings can certainly be divided, at a  
4 minimum, into two buckets, one that make reference to things  
5 that Mr. Schulte may or may not have learned from his  
6 employment at the CIA, which I would think you should operate  
7 with the presumption that they may contain classified  
8 information, versus things that don't relate to that at all,  
9 relate to his conditions of confinement, relate to filing  
10 issues, relate to those sorts of things, which clearly do not,  
11 presumably, involve any classified information. I would think  
12 that it makes sense to err on the side of caution and submit  
13 the former -- anything that references information that he may  
14 have gained from his time at the CIA or information that may or  
15 may not be on the WikiLeaks leaks -- and submit those in a  
16 fashion that ensures that they're reviewed.

17 But beyond that, Mr. Denton, again, I find it a little  
18 ridiculous that I need to involve myself in this, and I would  
19 think that counsel should be able to figure this out in a way  
20 that makes sense for everybody, recognizing that you have day  
21 jobs and they involve things that are more weighty than  
22 delivering mail, but be that as it may, what are your thoughts  
23 on this?

24 MR. DENTON: Your Honor, I generally tend to agree  
25 with you in that the order from the court, from Judge Crotty,

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1 previously was quite clear about sort of what the sequence of  
2 options was.

3 We have generally been able to retrieve mail from the  
4 SCIF when Ms. Shroff has asked. That's not something that  
5 we've always been able to do. Part of the problem is not the  
6 actual sort of transmission of mail but communication about it.  
7 So, for example, the defendant, in one of his filings, claimed  
8 that he had sent a letter to the government regarding the  
9 proposed protective order changes. We never got that. It was  
10 not in any of the sort of batches of mail that were picked up  
11 from the SCIF. We asked defense counsel, Is there a letter we  
12 need to pick up? And the response that we got from standby  
13 counsel was, You should call the MDC and talk to the lawyer on  
14 the case, Mr. Schulte.

15 I think in dealing with each other professionally  
16 here, it's entirely appropriate for us to just work out basic  
17 questions and for standby counsel to help perform some of these  
18 functions. If there are paralegals who can't do, I understand,  
19 but we've got to work around that somehow.

20 MS. SHROFF: Your Honor, that's really -- to further  
21 involve the Court in something, and I just ask you to indulge  
22 us here for a minute, that's not really what happened. The  
23 government asked us about a specific filing. I cannot stress  
24 this enough. Mr. Schulte insists that we remain standby unless  
25 he says otherwise.

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1           THE COURT: OK, but the fact of the matter is that's  
2 not actually up to Mr. Schulte. This order, among others,  
3 specifies what your duties and responsibilities are as standby  
4 counsel. The law specifies your duties and responsibilities as  
5 standby counsel, and I hate to break it to Mr. Schulte, but  
6 those duties and responsibilities are more substantial than he  
7 may think. All right? And we'll get to this in some of the  
8 issues that we have to discuss today. But the fact of the  
9 matter is some of the things that Mr. Schulte would like he  
10 doesn't get because he has standby counsel who are available to  
11 him to perform certain functions that are more substantial than  
12 he may want you to perform. So he's going to have to make some  
13 choices going forward, but making you potted plants is not  
14 among the choices that he has.

15           MS. SHROFF: I appreciate the Court letting him know  
16 that.

17           As to that particular letter the government describes,  
18 we informed the government we didn't know. Mr. Schulte was  
19 brought to the SCIF the next day. By 10:00 that morning, we  
20 had contacted Mr. Schulte. Both of us were unavailable to  
21 physically be in the SCIF, but we immediately contacted  
22 Mr. Schulte. We told him there was a letter that the  
23 government wanted that they didn't have and that he should  
24 contact the government. We asked the paralegal to place a call  
25 to Mr. Lockard, and I believe I literally told Mr. Schulte,

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1 Hang up on me now, call the government, answer their question,  
2 and then I will call you back at 1:00. And that's exactly what  
3 we did. That was the very next day after the government  
4 informed us of this missing letter of which neither Ms. Colson  
5 nor I had any information substantively.

6 So we did exactly what we were told to do. We  
7 communicated that to the man who had the answer and told him to  
8 call Mr. Lockard. Really, there isn't any reason for the Court  
9 to be involved. The procedures worked well before. The  
10 problem right now is that the government and Mr. Schulte do not  
11 want to speak to each other, and that's where there is a gap,  
12 and they, unfortunately, have to speak to each other, because  
13 they're opposing counsel.

14 THE COURT: All right. And we will get to that, but  
15 can I ask standby counsel and counsel for the government, let's  
16 try to do this better. I don't understand why you can't manage  
17 without court intervention to deal with just exchanging  
18 documents in an orderly fashion that minimizes the burdens on  
19 everybody. It just seems like that is something that you  
20 should be able to accomplish. It seems like it worked for a  
21 long time in this case, and I don't know why it has broken down  
22 recently, but this seems like something that everybody should  
23 be able to get past and do better. OK?

24 I don't have a better solution than that. It doesn't  
25 seem to me that the answer is to prescribe an ever more

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1 detailed procedure in an order that governs who does what and  
2 when. They're fairly specific. They're fairly clear. It  
3 seems like it's much more a function of everybody presuming  
4 good faith and trying to do right by the other side than it is  
5 about any orders that I can enter. OK?

6 Mr. Denton.

7 MR. DENTON: Understood, your Honor.

8 THE COURT: Ms. Shroff.

9 MS. SHROFF: Yes, your Honor.

10 THE COURT: In terms of filing of classified  
11 information or not, again, the orders on that are very clear.  
12 I reread the protective order that's currently in place. It's  
13 very clear. If standby counsel or Mr. Schulte have reason to  
14 believe that something contains classified information, they  
15 have certain obligations with respect to the handling of that  
16 and need to take care that it not get publicly docketed. By  
17 the same token, I would expect the government, if there is a  
18 problem, to bring it to my attention promptly and not to wait  
19 six, seven, eight days after something has been filed to alert  
20 me, let alone on a Friday evening, that there's a problem.

21 So again, I'm not sure if there's -- it doesn't strike  
22 me that there's a need for clearer or more specific orders. I  
23 think everybody just needs to try harder to comply with the  
24 orders that exist and do better. And again, to me, it seems  
25 like dividing the filings into buckets -- those that pertain to

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1 Mr. Schulte's knowledge as a CIA employee versus things that  
2 don't relate to that at all and erring on the side of caution  
3 with respect to the first bucket -- seems like a prudent way to  
4 approach it.

5 Any questions about that?

6 Mr. Denton.

7 MR. DENTON: No, your Honor. We understand.

8 THE COURT: Ms. Shroff.

9 MS. SHROFF: No, your Honor.

10 THE COURT: All right.

11 Mr. Hartenstine, do you have anything you want to add  
12 on that?

13 MR. HARTENSTINE: Thanks for asking, your Honor, but  
14 no.

15 THE COURT: All right. Let me also say what I said to  
16 Mr. Hartenstine earlier. I think part of the problem, and this  
17 goes back to what I said earlier about my hope that there will  
18 be fewer filings going forward, I think it would make sense for  
19 Mr. Hartenstine or one of his colleagues to be available on  
20 days where we can anticipate and do anticipate that Mr. Schulte  
21 will have substantive filings going forward, and my hope is  
22 that that will be clear from the schedule that we set today,  
23 and in that regard some of these issues will be less  
24 problematic if there's somebody here and available on those  
25 days when we anticipate substantive filings being made. But

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1 again, at the end of the day, I think it's as much everybody  
2 just trying to handle these things in good faith.

3 All right. Next on my list of case management things  
4 is Mr. Schulte has raised, in several filings -- ECF Nos. 582,  
5 591, and 605 -- an issue with respect to the forensic image of  
6 what he refers to or parties refer to as SC01. If I understand  
7 correctly, I think the gravamen of his complaint is that he's  
8 required to review the forensic image in the presence of an FBI  
9 agent and that he considers that to be unfair or an  
10 infringement on his right to prepare a defense.

11 Mr. Schulte, is that correct? Is there anything else  
12 you wish to say on that front?

13 THE DEFENDANT: Well, I think the primary issue Judge  
14 Crotty already ruled on, and there's an interlocutory appeal  
15 about this.

16 The issue that I raised here is a different issue.  
17 It's, in the forensic discovery that I received from the  
18 government, they gave me two -- there are two hard drives. One  
19 of them they allege has CP on it and the other one was  
20 encrypted that I cannot even access, and they don't allege it  
21 has classified information or CP, and so I'm trying to figure  
22 out what that drive is or why that's even not been produced to  
23 me in unclassified discovery outside of the SCIF, if it doesn't  
24 have any of those materials. So that's what my request was  
25 specifically in my December 16 letter.



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1 THE COURT: Again, maybe I'm missing something, but I  
2 think you had made a request with respect to the form of the  
3 items, and Judge Crotty rejected that and I'm not going to  
4 revisit that ruling. I thought that the gravamen of your  
5 current, remaining complaint had to do with whether you could  
6 review these materials in the presence of an FBI agent or not.

7 THE DEFENDANT: No. That's -- no, no. That's been  
8 resolved already. So the FBI, what they do is they take the  
9 drives out.

10 THE COURT: Let me stop you. Is there any remaining  
11 issue to be resolved?

12 THE DEFENDANT: Yeah, the issue isn't -- it's not a  
13 recurring issue. It's the fact that there is a second drive  
14 that's been produced that's part of the CP drives, but the  
15 government hasn't, isn't alleging there's any CP on it, so I'm  
16 trying to figure out what the second drive is, why it's  
17 included with the CP drives if there's no CP on it, and it's  
18 encrypted too, so I can't access the data. So there's  
19 basically two requests. One is for the government to decrypt  
20 it and give it to me in a decrypted format, and two, to either  
21 identify to me where the alleged CP material is, or if there's  
22 not anything, to explain why it's in restricted format.

23 THE COURT: All right.

24 THE DEFENDANT: Does that make sense?

25 THE COURT: Mr. Denton.

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1 MR. DENTON: Your Honor, I'm honestly a bit confused.

2 There were two discovery drives that were provided to  
3 the defendant that were recopied. One contains the SC01  
4 server, which has the child pornography on it, which is covered  
5 by the Adam Walsh Act provisions, which I understand does  
6 contain an encrypted partition that was encrypted by the  
7 defendant. There is a separate hard drive, which is the server  
8 02 hard drive, which does contain classified information. That  
9 does not have to be handled consistent with the Adam Walsh Act  
10 restrictions, and to the extent it is, we can clarify with the  
11 FBI or otherwise that it does not need to be.

12 THE COURT: Great.

13 MR. DENTON: Beyond that, I'm not sure what else there  
14 is to do.

15 THE COURT: Great. Why don't you clarify that with  
16 the FBI, and hopefully, that will resolve the issue.

17 All right, Mr. Schulte?

18 THE DEFENDANT: I think the confusion is that the SC1  
19 drive actually is including two -- it includes two separate  
20 drives, so I don't know how we can work this out. But SC1  
21 drive is actually two drives. There's SC1-1 and SC1 re 5.  
22 Those are two different, completely different hard drives that  
23 have completely different sets of data.

24 THE COURT: All right. Look --

25 THE DEFENDANT: I guess we just need to work it out.

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1           THE COURT: -- why don't you discuss that with  
2 Mr. Denton in your next call, but it seems like something that  
3 you should be able to sort out on your own.

4           Next item is SCIF time.

5           Mr. Schulte's preconference letter -- again,  
6 ECF-644 -- complains about the late arrivals to and from the  
7 SCIF on certain days. I certainly understand the frustration,  
8 but those seem like more isolated problems than systemic ones,  
9 and so I don't think there's any cause for me to intervene and  
10 deal with it. Otherwise, I haven't heard any complaints, so I  
11 assume that the system of increase in SCIF time is working.  
12 But I was advised by the marshals that Mr. Schulte is not even  
13 using all of his time and on a regular basis asks to leave the  
14 SCIF early, which is certainly fine by me, but will make it a  
15 little bit hard to complain at a later time about insufficient  
16 time in the SCIF. So again, given that I haven't heard larger  
17 complaints, I'm hoping and assuming that that is not an issue  
18 that we need to spend more time on.

19          THE DEFENDANT: So --

20          THE COURT: Yes, ms. Shroff.

21          MS. SHROFF: Your Honor, I just wanted to take a  
22 minute and say that I am eternally grateful to the United  
23 States Marshals Service for working with us, especially Gary,  
24 whose last name I do not know. They actually do take the time  
25 to even email us and tell us at times when Mr. Schulte is going

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1 to be brought literally hours late. It sometimes helps. It  
2 sometimes doesn't. But I do raise this one point, and I also  
3 raise this on behalf of the marshals service itself.

4 I am informed that when Mr. Schulte is taken back,  
5 because he is a SAMs inmate, he and the marshal are made to sit  
6 in their car for hours at a time before Mr. Schulte is  
7 processed back into the MDC. So we tried to help out both --  
8 and I want to be clear, both -- the marshals and Mr. Schulte so  
9 they didn't spend hours in their car sitting there, that maybe  
10 if Mr. Schulte went back a little bit earlier, then he could  
11 slide in before the regular detainees are taken back to the  
12 jail.

13 Sometimes Mr. Schulte just wants to go back earlier,  
14 but sometimes we do say it's better for him to go back faster  
15 so that they don't all sit in their car, and I think that I've  
16 encouraged the marshals service to speak to you about this so  
17 that they don't expend the time sitting in the car just waiting  
18 there with Mr. Schulte. I just wanted to flag that for you  
19 because I think they might approach you at some point.

20 THE COURT: Because what?

21 MS. SHROFF: Because I think the marshals may approach  
22 you with that problem at some point.

23 THE COURT: OK.

24 MS. SHROFF: OK.

25 THE COURT: Thank you.

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1 Mr. Schulte.

2 THE DEFENDANT: Yeah. So two, two issues on that, for  
3 the arrival and the departure. So yeah, the marshal to my  
4 right, he was there one evening where we waited five and a half  
5 hours, but essentially, according to MDC, since I'm SAMS, we  
6 always have to go back to the end of the line. So even though  
7 we arrive at MDC first, we end up waiting six hours because new  
8 cars, as they come in, they keep passing us because they say I  
9 have to go last. So that is consistent, and that is the reason  
10 why I try to leave a couple hours early, at two, simply so --  
11 to hope to try and avoid that issue.

12 So on the arrival issue, the Court's order was very  
13 helpful, and it was working great, but the last three weeks  
14 have been consistent in that MDC, due to this new trial, hasn't  
15 produced me to the marshals until 11. So the marshals show up  
16 at 7 a.m. and tell me --

17 THE COURT: All right. Mr. Schulte, that trial has  
18 summations going on today, so it's not going to be lasting much  
19 longer. That's a temporary problem.

20 THE DEFENDANT: Oh, so we think that's going to be  
21 resolved? OK.

22 THE COURT: I'll talk to the marshals about the return  
23 issue, since it sounds like that has some compounding effects,  
24 but I obviously don't know if that's something that I can fix  
25 or not. But I'll certainly raise it with them and see what can

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1 be done.

2           The next item I said we'd talk about earlier is the  
3 recording of phone calls. The defendant's request for an order  
4 directing the government to stop recording calls with him is  
5 denied. The government provides good reasons for recording the  
6 calls. In fact, it seems to me that it's in the defendant's  
7 interests for there to be a record of such communications, and  
8 his argument that recording the calls violates his Fifth and  
9 Sixth Amendment rights is without merit, indeed probably  
10 frivolous. Whether or to what extent the government may use  
11 those recordings at trial is an entirely separate matter that  
12 is not ripe for me to decide today and may never become an  
13 issue, particularly if Mr. Schulte is as careful as he should  
14 be in those communications. But this is a problem and  
15 complication that is inherent in representing oneself in a  
16 criminal case and one of the many reasons that most judges  
17 would tell defendants not to go down that path.

18           I also want to be clear, Mr. Schulte, you do not have  
19 the option to refuse to speak to the government. So Ms. Shroff  
20 mentioned earlier or you mentioned earlier that those  
21 communications were not going to be occurring. That is not an  
22 option. There are prior orders of the court and Judge Crotty  
23 that require that communication. It is absolutely necessary  
24 for the orderly and efficient management of this case, and  
25 there is no alternative given that you are representing

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1 yourself. You are acting as your own lawyer. It is necessary  
2 for you to converse with the government about the sorts of  
3 issues that we're discussing today and many other issues. And  
4 that is particularly true given your objections -- objections  
5 that are without basis, by the way -- to more than minimal  
6 involvement on the part of standby counsel.

7 The bottom line is that this case cannot proceed  
8 without orderly and regular communications between you and the  
9 government, and if you refuse to communicate with the  
10 government, notwithstanding the fact that they may record those  
11 calls, you risk forfeiture or revocation of your *pro se* status.  
12 I don't know how to put it any more bluntly than that.

13 Any questions about that, Mr. Schulte?

14 (Defendant and counsel conferred)

15 THE COURT: Forgive me, but we have a lot of ground to  
16 cover today.

17 THE DEFENDANT: Is there any way that we could just  
18 revert to letters and assuring that the government is  
19 delivering the letter within a day and I am in the SCIF and I  
20 can send a letter within a day of the SCIF instead of doing the  
21 phone calls.

22 THE COURT: No.

23 THE DEFENDANT: Because I want to do this quicker.

24 THE COURT: No. It think it is clear to me that the  
25 issues that we're discussing are issues that require

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1 communication. Doing it by letter is inefficient and not  
2 likely to resolve many of these issues. It requires more  
3 efficient communication than that. I'm happy to say the  
4 telephone calls should, in general, be restricted to  
5 logistical, nonsubstantive issues. I think that makes sense,  
6 but I think that those conversations have to occur. So if  
7 they're limited to logistical, nonsubstantive issues, then I  
8 can't imagine that any recording would ever be used against  
9 you, and as I said, I think it's in everybody's interests that  
10 there is a record of those communications. So the bottom line  
11 is no. All right?

12 Let's move on.

13 The next item on my list is the modifications to the  
14 protective order. I got a letter proposing some relatively  
15 minor modifications from the government on Friday. It did not  
16 appear to be a joint submission, so I don't know what that  
17 means about standby counsels' views or Mr. Schulte's views. I  
18 would also note that I had contemplated, and I apologize if my  
19 order wasn't clear on this point, was that it would pay to have  
20 a single supplemental -- not supplemental, really a superseding  
21 protective order that supersedes all the existing protective  
22 orders, so there's a single order and things are clear and  
23 updated and so forth.

24 The government's letter makes reference to a  
25 supplemental protective order at ECF-75, but that's not



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1 incorporated into the proposal, so at a minimum, I'd be  
2 inclined to send it back, if you will, and have you guys take  
3 another stab at it. But I also want to know what Mr. Schulte's  
4 and standby counsels' thoughts are.

5 Mr. Denton.

6 MR. DENTON: Your Honor, just with respect to that  
7 last point, I think our view is that given the discussions that  
8 have occurred with respect to the security measures in the SCIF  
9 and, frankly, the government's view that we defer entirely to  
10 what the CISO and the marshals believe is necessary, that's not  
11 something that would necessarily need to be addressed, and so a  
12 protective order that addressed the handling of classified  
13 information would supersede the other orders. But to the  
14 extent the Court wants us to make that clearer, we're happy to,  
15 as you said, take another stab at it.

16 THE COURT: All right. I certainly think you should  
17 make clear that it supersedes all prior protective orders, and  
18 you know the record better than I do, if there's any out there  
19 that it should not supersede, then you should make that clear.

20 But, Ms. Shroff, any comments on the government's  
21 proposed modification?

22 MS. SHROFF: Your Honor, we did discuss with the CISO  
23 this morning a proposal. We think that that proposal, if  
24 accepted by the government and implemented, it would really  
25 reduce any risk of a spill, and it would be hopefully more

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1 efficient. Perhaps in a show of good faith, the CISO, the  
2 government, myself, and Mr. Schulte could meet. I think we  
3 could meet in a SCIF or in the Court's SCIF so that we could  
4 hash out the new proposal and see if we could submit a final  
5 CIPA protective order for the Court's consideration where the  
6 defendant is going *pro se*. And of course, it can be limited to  
7 this particular set of facts, which is very much an anomaly,  
8 where Mr. Schulte is *pro se* in a classified litigation. It's  
9 just a thought.

10 THE COURT: OK.

11 Mr. Schulte, anything you wish to say? Again, I'm  
12 happy to take that up. That was sort of the idea that was  
13 supposed to have happened before last Friday's deadline, but be  
14 that as it may, I'm happy to give you another stab at it.

15 THE DEFENDANT: Yeah. So like the proposed schedule,  
16 I didn't receive it until after the deadline, and so after I  
17 received it and I spoke with standby counsel about the  
18 government's proposal just today, so we just barely --

19 THE COURT: OK. So why don't we do this. I'll give  
20 you all until January 7 as well to try and make a joint  
21 submission and any tweaks or further modifications that you  
22 think are appropriate; I will definitely include the CISO in  
23 that discussion. I plan to consult him separately with respect  
24 to any modifications that he might suggest. I think it should  
25 make reference -- among other things he and I discussed, right

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1 now he's named in it, but none of his colleagues are, and I  
2 think it should either name them as well or provide for his  
3 associates, without specification, in some way that makes  
4 sense. But the bottom line is why don't you guys try again,  
5 and in the meantime, the existing protective orders will remain  
6 in effect, as they have been.

7 The next item is the motion regarding the  
8 classification review process. I meant to discuss this with  
9 Mr. Hartenstine before, and we didn't get to it, but the  
10 government submitted a proposal. This is at ECF No. 559.  
11 Mr. Schulte responded at ECF No. 604.

12 I do have two concerns about the government's  
13 proposal. One is it seems to be a step backwards. My  
14 understanding is that at least with respect to some documents,  
15 maybe court orders, that the current expectation is that a  
16 review process would be done within two weeks. I think the  
17 government is now proposing that everything be done within  
18 three, and the idea wasn't to make things worse; it was to make  
19 things better.

20 No. 2, I think Mr. Schulte's point is well-taken that  
21 not all filings are created equal; that is to say, there's a  
22 huge difference between a two-page letter and a 50-page brief.  
23 The former could be reviewed much more swiftly than the latter,  
24 and I think that having a single deadline of three weeks  
25 without regard for the length or nature of the submission is

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1 not necessarily appropriate, and some sort of either scaled  
2 system or the like would make sense.

3 Mr. Denton, any thoughts about either of those?

4 MR. DENTON: Your Honor, I think we were honestly just  
5 going for ease of administrability on a deadline that we were  
6 assured by the classification authority we could hit without  
7 fail and have it be something across the board with an  
8 understanding that court orders would be prioritized and  
9 anything specified to be cleared within a shorter period of  
10 time. But that said, we're happy to sort of work with the  
11 constraints that the Court sees appropriate here.

12 THE COURT: All right. Why don't you take those  
13 comments under advisement and maybe submit another proposal by  
14 January 7. And since you'll be discussing things with Mr.  
15 Hartenstine and Mr. Schulte, you can include that in your  
16 discussions as well. I think it probably would make sense to  
17 have -- I understand the argument for the ease of  
18 administrability, but it doesn't seem like it will be  
19 impossible -- and I want to make clear I don't think  
20 Mr. Schulte's proposal of having it be proportional to the  
21 length is the necessarily the way to go, but it seems like  
22 having a few different categories -- court orders, defense  
23 submissions of X length, defense submissions of greater than X  
24 length. But it might make sense to put it into those  
25 categories and have different lengths or presumptive lengths

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1 for those. But again, it seems like there's a big difference  
2 between a two-page letter and a 25-, or 50-page brief.

3 MR. DENTON: Your Honor, I will say I think that is,  
4 by and large, true, but I would note that obviously a 25-page  
5 brief that addresses a single issue whether there's classified  
6 information in a limited different portion of it is a different  
7 matter than, for example, some of the ten-page letters that  
8 address almost entirely classified content. But we understand  
9 the Court's concern, and we'll talk with the classifying  
10 authorities and Mr. Hartenstine about a reasonable way to  
11 divide these up into buckets.

12 THE COURT: All right. And I'm not saying that my  
13 suggestion is the right one; I just think something that  
14 acknowledges that there is a bit of a sliding scale.

15 I'm not going to order the government to record all  
16 research, communication, and documentation with respect to the  
17 classification review process. Mr. Schulte cites no authority  
18 to support that request, and I'm aware of none.

19 As to the sealed *ex parte* or *in camera* documents, I'm  
20 not quite sure I understand, Mr. Schulte, what the issue is  
21 there or why I shouldn't require portion marking if they're  
22 going to be under seal or *ex parte* or *in camera* in their  
23 entirety. That seems like a gratuitous burden, but am I  
24 missing something?

25 THE DEFENDANT: I guess I'm a little confused. The

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1 portion marking, obviously, when the government does its  
2 classification review that it should portion mark the material  
3 so I know what level it's classified at. That was the portion  
4 marking. And what specifically -- yeah, just to specifically  
5 note, maybe -- for example, if it's a long paragraph, it should  
6 note what parts are unclassified and which parts are classified  
7 and at what level they're classified as, so then I would know.  
8 Because basically depending on people's security clearance or  
9 something like that, you're just always supposed to know at  
10 what level something's classified as so you know how to  
11 communicate that and who you can communicate that to.

12 THE COURT: Mr. Denton, do you have any thoughts on  
13 that item?

14 MR. DENTON: Again, your Honor, I think our plan was  
15 to do exactly that for anything that would be filed publicly,  
16 but we were only saying, as your Honor noted, it seems like an  
17 unnecessary burden for documents filed either under seal or *ex*  
18 *parte*.

19 THE COURT: All right. What about Mr. Schulte's  
20 point, which is well-taken, that he needs to know with whom he  
21 can share those documents.

22 MR. DENTON: So, we can certainly identify the level  
23 of classification for the documents. That's not an issue, your  
24 Honor.

25 THE COURT: All right. Why don't you do that, and the

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1 hope is that that would suffice, and I agree that it seems like  
2 an unnecessary burden to portion mark those documents. But to  
3 the extent that there's a particular document that Mr. Schulte  
4 has an issue with, either because he wants to share it with  
5 someone or otherwise, then perhaps you can confer about that  
6 and you can provide more detailed information, as appropriate.  
7 But as a default, I don't think that should be required.

8 Mr. Denton, Mr. Schulte requests disclosure of what he  
9 refers to as the classification block that I guess has some  
10 information regarding who created it, who the classifying  
11 authority is, and so on. I confess I don't know enough about  
12 this to know what that refers to, but any issues there?

13 Or maybe Mr. Hartenstine can shed some light on that.

14 MR. DENTON: Your Honor, honestly, I think that's a  
15 conversation, a question we'd have to discuss a little more  
16 extensively with Mr. Hartenstine and with the classifying  
17 authorities. I'm not entirely sure what the sensitivities, if  
18 any, about that some of that are. So I know that when material  
19 is produced in classified discovery, that commonly is something  
20 that is redacted, so it may be that it's not an issue. I'm  
21 just not sure what the answer is.

22 THE COURT: All right. So why don't you take up, and  
23 since you'll be submitting a more refined proposal anyway, you  
24 can address that at the same time.

25 Mr. Schulte's reply renews the question of whether I

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1 have authority and should exercise it to review the  
2 government's classification decisions. I will address that  
3 issue later in connection with Mr. Schulte's motion for  
4 reconsideration of my December 3 order, so I'll table that for  
5 the moment.

6 The next item is Mr. Schulte's desire to file  
7 additional motions. I had taken his prior letter, at ECF No.  
8 587, to mean that he was listing the motions, the universe of  
9 motions that he sought to bring, but obviously that wasn't the  
10 case, and if I misunderstood, I apologize for that.

11 Let me start by saying I don't know if, and this is at  
12 ECF No. 630, Mr. Schulte is suggesting that the cases he cites,  
13 including, for instance, *Palmer* and *Todd*, stand for the  
14 proposition that a defendant is free to remake the same motions  
15 before a retrial, but I don't read those decisions that way.

16 I read them to stand for the proposition that law of  
17 the case does generally apply where, as here, there has been a  
18 mistrial and that the Court has discretion to decide whether  
19 and to what extent to revisit issues that were decided before  
20 the first trial. See, e.g., *United States v. Todd*, 920 F.2d  
21 399, 403-04 (6th Cir. 1990). The cases also point to a  
22 distinction between rulings made by a court on formal motions  
23 versus rulings made on objections during trial, suggesting that  
24 trial courts should have ample flexibility to revisit  
25 objections during the heat of trial without regard to rulings



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1 in an earlier proceeding. See, e.g., *U.S. v. Palmer*, 122 F.3d  
2 215, 221 (5th Cir. 1997); *United States v. Mann*, 590 F.2d 361,  
3 371 (1st Cir. 1978). *Palmer*, on which defendant relies most  
4 heavily, is not to the contrary. There, the Court of Appeals  
5 found waiver for failure to renew objections before a retrial,  
6 but only because "the trial court expressed in unambiguous  
7 terms that it would not automatically revive any of Palmer's  
8 pretrial motions. 122 F.3d at 221; see also *United States v.*  
9 *Hoffecker*, 530 F.3d 137, 166 (3d Cir. 2008), which reads *Palmer*  
10 in precisely that way. Thus, the cases stand for the  
11 proposition that I have discretion to adhere to Judge Crotty's  
12 rulings or to revisit them, as I wish, basically.

13 As an exercise of that discretion, I do not intend to  
14 revisit rulings that Judge Crotty made before the first trial  
15 and since the first trial. And I'm not saying that if I  
16 encounter an issue that if I think I should deal with  
17 differently I won't revisit it, but as a general matter, I  
18 adhere to his rulings with respect to substantive motions  
19 before the first trial and since that trial. The burdens  
20 imposed by the issues in this case are great enough without  
21 reconsidering *de novo* every decision that Judge Crotty made in  
22 this case. The interests in finality and narrowing the issues  
23 for retrial support adhering to these rulings. Thus,  
24 Mr. Schulte need not renew those motions to preserve them for  
25 appeal. By contrast, I will not necessarily adhere to any

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1 rulings on simple objections during trial or with respect to  
2 things like jury instructions, which is to say that the parties  
3 should and, to preserve them for appeal, must make any such  
4 objections that they think are appropriate without regard for  
5 rulings in the first trial.

6 Having said that, I'm inclined to let Mr. Schulte make  
7 the three new motions that he discusses in his letters. This  
8 is ECF Nos. 630 and 644 -- another example of sort of  
9 repetitive filings, Mr. Schulte -- first, there's a new CIPA 4  
10 motion for basic access to backups; second is a new motion to  
11 preclude the government from introducing evidence from the  
12 digital forensic crime scene, and third is a motion to suppress  
13 specific documents seized from the MCC on the basis of attorney  
14 client privilege -- with the understanding that one of the  
15 issues that the parties may and indeed should brief in  
16 connection with those motions is whether Judge Crotty  
17 previously ruled on the issue. If I conclude that he did, I  
18 may deny the motion on that basis alone.

19 Any objections to that, Mr. Denton?

20 MR. DENTON: Your Honor, I think the only concern in  
21 particular is with respect to the first one, which is  
22 ostensibly styled as a CIPA Section 4 motion. Insofar as CIPA  
23 Section 4 authorizes the government to make an application to  
24 delete or withhold items from discovery, I think what this is  
25 is just a repackaging of the motion to compel that the

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1 defendant has filed many times, that has been denied many  
2 times, and that is currently the subject of one appeal and one  
3 mandamus petition. So I think that one may stand in a little  
4 bit of a different category, but to the extent that those are  
5 points the Court wishes us to make in response to a submission,  
6 we're certainly happy to do it that way.

7 THE COURT: I guess to put it another way, I'm  
8 inclined to let Mr. Schulte raise the issues that he now  
9 identifies he wants to raise, and if I'm persuaded that Judge  
10 Crotty has ruled on them, I probably won't revisit them, and if  
11 I realize or discover that he has raised the issues on appeal,  
12 I may conclude that I don't have jurisdiction to address them  
13 at all. But it seems to me that the best thing is to develop  
14 the record on those issues and allow you to raise those issues  
15 in your opposition.

16 Mr. Schulte, any questions on your end? To be clear,  
17 I will, I think, adjust the deadlines for the filing of motions  
18 in light of that ruling. But any questions? That is to say,  
19 I'm granting your request to file those three motions, but I  
20 assume nothing further.

21 THE DEFENDANT: Thank you, Judge.

22 Just to be clear, the very first thing, regarding the  
23 *Palmer* case, I just wanted to put on the record I think  
24 everything's good there. And yeah, the CIPA 4, though, I'm  
25 pretty sure he miscited what that CIPA 4 is.

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1 THE COURT: Mr. Schulte, you'll be able to raise it in  
2 your motion.

3 THE DEFENDANT: OK.

4 THE COURT: It doesn't sound like we have to discuss  
5 that further at this time, and again, I'll discuss the  
6 deadlines and page limits shortly.

7 Let me be clear, I said this in the endorsement  
8 authorizing you to file the other two motions, the time is  
9 coming to narrow the issues for retrial, not expand them. You  
10 have permission to file these five motions. As far as I'm  
11 concerned, that's basically it as to anything that is  
12 retrospective. If there are issues going forward, obviously  
13 that's a different story; that is to say, you're going to have  
14 to demonstrate good cause to raise any other motions, and good  
15 cause would be because they're dealing with ongoing issues or  
16 things that you should not have known about before. But you've  
17 now requested leave to file these five motions. I've granted  
18 that request, and that's it in terms of things that are  
19 backward-looking.

20 Do you understand that?

21 THE DEFENDANT: Yes. Should we -- in my -- I did a  
22 proposal, too, of setting pretrial motion deadlines.

23 THE COURT: I said I would address that --

24 THE DEFENDANT: OK.

25 THE COURT: -- in a minute.

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1 THE DEFENDANT: All right.

2 THE COURT: All right.

3 The government made a request in its preconference  
4 letter to clarify the rules or default rules for motions. I  
5 certainly recognize -- and again, my hope is that this will  
6 begin to change going forward -- that there have been a lot of  
7 filings and that may be part of the cause of confusion or  
8 burden here, but I'm not sure I understand what the confusion  
9 is. It seems like there's a default, and if I don't issue an  
10 order specifying that an opposition should be filed in a  
11 different manner or timing, that that default would apply to  
12 anything filed as a motion or properly filed as a motion. But  
13 is there a need to clarify beyond that?

14 MR. DENTON: Your Honor, I think the only confusion is  
15 that some of the things that were being filed as motions seemed  
16 to fall within the category of retrospective things that the  
17 Court had indicated would not be considered, and so we're happy  
18 to go ahead and just respond to everything. But we were trying  
19 to figure out a little bit better whether we should be drawing  
20 a distinction between things that the Court should act on  
21 before we file a response or, again, whether the Court just  
22 wants us to respond to everything.

23 THE COURT: Well, let me say I don't think there's any  
24 confusion, and I think after today in particular, hopefully  
25 there will be less of an issue still. If there is, you're

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1 welcome to file a letter and say, How would you like us to --  
2 we're going to respond to it in this fashion, if you'd like me  
3 to handle it differently, then tell us, and I'm happy to tell  
4 you if I think it should be handled differently, but it seems  
5 to me I'm trying to simplify things, and hopefully it will  
6 work.

7 MR. DENTON: I think, as your Honor suggested, it  
8 sounds like we're going to end up in a pretty holistic  
9 resolution today, but I think that should cover the  
10 government's concern.

11 THE COURT: All right. Great.

12 So then let's talk about dates and deadlines. By  
13 order, I had adjusted the trial date in light of Mr. Schulte's  
14 expert's conflict and moved it to June 13. Everyone should  
15 understand and treat that as a firm date. Obviously, recent  
16 events indicate that the pandemic is not quite behind us yet,  
17 so I can't predict what pandemic-type situations are going to  
18 be at that time, but barring the pandemic affecting things, you  
19 should treat that date as the day on which this case is going  
20 to trial. So what that means is if there's any issue that  
21 could affect our ability to start trial -- I think speaking  
22 with a mask on for this long is definitely causing me to get  
23 something stuck in my throat, but I assure you that I don't  
24 have Covid.

25 In any event, what that means is that if there is any

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1 issue that could affect our ability to start trial on June 13,  
2 it is incumbent upon you to raise it in a timely fashion. If  
3 you fail to do so, if you fail to raise something that you  
4 could have and should have raised at an earlier date that would  
5 affect our ability to start trial on June 13, you're probably  
6 not going to get whatever it is you think that you're entitled  
7 to, and your application may be denied on that basis alone. So  
8 I want to make sure everyone understands that.

9 Mr. Denton.

10 MR. DENTON: Understood, your Honor.

11 THE COURT: Mr. Schulte.

12 THE DEFENDANT: Understood.

13 THE COURT: Ms. Shroff, I assume you and Ms. Colson  
14 understand.

15 MS. SHROFF: We understand, your Honor.

16 THE COURT: All right. Very good.

17 With respect to the pretrial schedule adopted by order  
18 entered on December 6 at ECF No. 628, the defendant,  
19 Mr. Schulte, makes a proposal to make January 28 a deadline for  
20 the CIPA Section 4 notices and CIPA Section 10 notices.

21 Mr. Denton, do you have a response or view on that?

22 MR. DENTON: Your Honor, with respect to the Section  
23 10 notice, that's fine. I'm not sure whether we're going to do  
24 a supplemental one here or not. But that's perfectly fine.

25 With respect to the CIPA Section 4, again, I think

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1 that may just make sense to roll together with the motions  
2 deadline, which is my understanding of what the defendant has  
3 also proposed for January 28.

4 THE COURT: All right. I am prepared to adopt that  
5 January 28 proposal for the CIPA Section 10 notices as well as  
6 for the pretrial motions deadline. That is what Mr. Schulte  
7 requests, and I'm happy to give it to him. By endorsement, I  
8 had extended the deadline for the previous two motions to  
9 January 7.

10 By the way, that endorsement contained a typo and  
11 inadvertently reduced the pages that Mr. Schulte had to brief  
12 on them. That was a mistake that, in any event, will be mooted  
13 by what I'm about to say. I would prefer to get a single set  
14 of motions rather than seriatim motions, so I'm going to extend  
15 the deadline for all five of these motions to January 28 to be  
16 supported by a single consolidated memorandum of law up to 55  
17 pages; the government response by February 25, up to the same  
18 55-page length, and any reply by March 11, not to exceed 20  
19 pages. I recognize if there are delays and the like, that may  
20 require some adjustments of a couple days here and there, but  
21 my intention is to stick to those deadlines.

22 Any requests questions or objections?

23 Mr. Denton.

24 MR. DENTON: Not from the government, your Honor.

25 THE COURT: Mr. Schulte.



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1 THE DEFENDANT: No objection.

2 THE COURT: All right. That concludes the case  
3 management-related things that I wanted to address.

4 We still have a lot of ground to cover, but we've also  
5 been going at this for a while.

6 Let me check with the court reporter.

7 All right. We're good. Let's carry on.

8 The next item on my agenda is the conditions of  
9 confinement-related issues. These are raised in a number of  
10 filings, ECF Nos. 590, 591, 605, 617, and 631.

11 Mr. Schulte raises a host of different issues. They  
12 run the gamut from access to the law library to things like  
13 removal of the basketball "goal," whatever that may be, from  
14 the recreation yard. Putting aside the merits of these  
15 complaints, there's a threshold question of whether I have  
16 authority even to entertain them. The answer to that question  
17 with respect to the vast majority of Mr. Schulte's complaints  
18 is that I do not. It is well established that, in general,  
19 federal pretrial detainees, such as Mr. Schulte, may only  
20 challenge their conditions of confinement in a civil action  
21 brought pursuant to a *Bivens* order in a Section 2241 habeas  
22 petition. See, e.g., *United States v. Moi*, 2021 WL 4048596, at  
23 \*8 (D. Alaska, June 7, 2021) (citing cases). The one  
24 "exception to this rule is an inmate's challenges to conditions  
25 of confinement that impinge his or her ability to consult with

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1 counsel or exercise other trial rights." *United States v.*  
2 *Yandell*, 2020 WL 3858599, at \*4 (E.D. Cal. Jul. 8, 2020)  
3 (citing cases); see also *Moi*, 2021 WL 4048596, at \*8. To allow  
4 a criminal defendant to "file grievances in his criminal  
5 proceeding not directly related to his ability to exercise his  
6 rights in that proceeding would circumvent his obligation to  
7 exhaust administrative remedies before seeking redress in  
8 court." *Moi*, 2021 WL 4048596, at \*8.

9 As Judge Crotty has noted repeatedly before, see ECF  
10 Nos. 453 and 526, the cases on which Mr. Schulte relies, see,  
11 e.g., ECF No. 631, to suggest otherwise do not call for a  
12 different conclusion. To the contrary, they reaffirm that the  
13 proper vehicle to challenge most conditions of confinement is a  
14 habeas petition pursuant to Section 2241. See, e.g., *United*  
15 *States v. McGriff*, 468 F.Supp.2d 445, 447 (E.D.N.Y. 2007);  
16 *United States v. Bout*, 860 F.Supp.2d 303, 307 n. 12, (S.D.N.Y.  
17 2012). To be sure, the courts in those cases and others did  
18 entertain challenges to the conditions of confinement in the  
19 criminal cases -- treating them as petitions pursuant to  
20 Section 2241. I could do the same but for one fundamental  
21 problem: the law is clear that a Section 2241 petition  
22 challenging the conditions of confinement must be brought in  
23 the district of confinement, which, here, is in the Eastern  
24 District of New York. See *Rumsfeld v. Padilla*, 542 U.S. 426,  
25 447 (2004); *Goodall v. Von Blanckensee*, 2019 WL 8165002, at \*4

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1 (S.D.N.Y. Jul. 19, 2019) (citing cases). The only case cited  
2 by Mr. Schulte that arguably comes close to doing otherwise or  
3 supporting his contention that I can exercise authority here is  
4 *United States v. Khan*, 540 F.Supp.2d 344 (E.D.N.Y. 2007), in  
5 which the district court dismissed a challenge to the  
6 conditions of confinement at the MCC, which is in this  
7 district, for lack of exhaustion without suggesting that, but  
8 for the lack of exhaustion, the court would have lacked  
9 authority to address it. But in the face of the case law  
10 holding that I do not have jurisdiction, that is hardly  
11 compelling authority suggesting that I do, since it dismissed  
12 the claims or the petition on other grounds.

13 In short, I cannot and I will not entertain any  
14 complaints with respect to the conditions of confinement unless  
15 they materially infringe upon the ability to consult with  
16 counsel, which doesn't really apply here, since Mr. Schulte is  
17 proceeding *pro se*, or the exercise of his trial rights. In  
18 applying that rule here, the vast majority of Mr. Schulte's  
19 complaints must be dismissed or disregarded, including the  
20 lighting conditions, sound conditions, and temperature in his  
21 cell; his solitary confinement; the monitoring of his cell by  
22 camera; the lack of a rubber guard on the window lid to his  
23 cell; his complaints about the quantity and quality of food and  
24 meals in the commissary; the lack of a comfortable chair; the  
25 lack of television in his cell; the lack of adequate access to

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1 the regular -- that is, non-law -- library; restrictions on his  
2 phone usage and social visits; the fact that he is shackled  
3 when moved; the removal of the basketball goals, not to mention  
4 his complaints about the sink, toilet, shower, windows, and  
5 lockers. It is quite clear that none of these things, even  
6 together, rise to the level of infringing on Mr. Schulte's  
7 trial-related rights. They certainly have not inhibited him  
8 from zealously representing himself, as the sheer number of  
9 filings since the last conference that I held makes clear.  
10 Accordingly, I do not have jurisdiction to entertain those  
11 complaints, and I do not expect to see them in any future  
12 applications to me.

13 Now, there is, as far as I believe or can tell, only  
14 one condition-of-confinement issue over which I think I do have  
15 jurisdiction because it does relate to Mr. Schulte's trial  
16 rights; namely, access to the law library. The truth is that I  
17 would be on firm ground denying any relief there too because  
18 every court to consider the question, including the Second  
19 Circuit, has held that "the right to represent oneself in  
20 criminal proceedings, [though] protected by the Sixth  
21 Amendment, does not carry with it a right to state-financed  
22 library resources where state-financed legal assistance is  
23 available. *Spates v. Manson*, 644 F.2d 80, 84-85 (2d Cir.  
24 1981); *see also Tellier v. Reish*, 164 F.3d 619 (2d Cir. 1998);  
25 *Smith v. Hutchins*, 426 F.App'x 785, 790 (11th Cir. 2011);

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1 *United States v. Byrd*, 208 F.3d 592, 593 (7th Cir. 2000); and  
2 *Benjamin v. Kerik*, 102 F.Supp.2d 157, 163-64 (S.D.N.Y. 2000).  
3 Instead, any right of access to legal resources owed to  
4 pretrial detainees "is satisfied when the presiding courts  
5 merely offer such detainees appointed counsel or standby  
6 counsel." *Stanko v. Patton*, 2007 WL 1309701, at \*2-3 (D. Neb.  
7 Mar. 28, 2007) (citing cases). Here, of course, the defendant  
8 has not one but two dedicated and very skilled standby counsel.

9 That said, I do think it is appropriate to ensure that  
10 Mr. Schulte has adequate time in the law library to prepare his  
11 case.

12 At ECF No. 590, he initially claimed that he had only  
13 one hour per day, but when the government responded, at ECF No.  
14 591, that he actually has two hours per day, Mr. Schulte  
15 admitted that that was the case if he forewent his recreation  
16 time. He may not like that, but it is what it is, and it  
17 certainly doesn't rise to the level of a violation of his  
18 rights.

19 That said, I'm a little unclear from the record if the  
20 government's submission states that it will confer with the MDC  
21 and arrange for him to have ten hours per week, but according  
22 to Mr. Schulte, he only has time on the days when he is not  
23 brought to the courthouse to work in the SCIF and that even  
24 with the two hours per day, that doesn't come close to ten  
25 hours.

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1           So, Mr. Denton, I don't know if you can clarify that  
2 or shed some light on, it but I wanted to ask you.

3           MR. DENTON: Your Honor, I think, first of all, I  
4 think it is correct that, as a general matter, he does not get  
5 that time on days when he is brought to the SCIF. That's  
6 something we're working on addressing. By and large, I think I  
7 would say that the government's posture is that we are mindful  
8 of the Court's orders that the defendant may need more of  
9 various accommodations as we get closer to trial in order to  
10 prepare, and we're working with the MDC on trying to figure out  
11 the best ways to do that. We don't have obvious answers yet  
12 because of the constraints of the SCIF productions and the  
13 defendant's status under SAMs, but it is something that we are  
14 conferring with the MDC about notwithstanding the law that your  
15 Honor cited.

16           THE COURT: All right. Why don't you plan to update  
17 me in the letter of January 7 as well. I think access to the  
18 law library is important not only to prepare for trial but also  
19 given the schedule that I just imposed with the motions that  
20 are due by January 28, I think now is a critical time for that  
21 purpose too. If anything, he needs access to the law library  
22 more in connection with the preparation of motions than he does  
23 in preparation for the trial itself, so I think ensuring that  
24 the MDC understands that and trying to figure out a means by  
25 which he can get up to ten hours per week even with the SCIF

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1 time probably makes sense. So if you can update me by January  
2 7, but get in touch with them even before that so as to not  
3 lose the time between now and January 7, that would be great.  
4 All right?

5 MR. DENTON: Yes, your Honor.

6 THE COURT: Separately, Mr. Schulte, at ECF No. 623,  
7 raises issues with respect to problems with the computer and  
8 the keyboard in the law library. I assume that those issues  
9 have been or will be worked out, but they're not the kinds of  
10 things that I plan to involve myself in unless they rise to the  
11 level of materially affecting his trial-related rights, which,  
12 as far as I can tell, they plainly don't.

13 The bottom line is, Mr. Schulte, I'll try to ensure  
14 that you do get more time in the law library in the coming  
15 weeks as you prepare the motions that you wish to file. Beyond  
16 that, I don't intend to do anything with respect to the issues  
17 that you've raised regarding your conditions of confinement.

18 Anything you wish to say?

19 THE DEFENDANT: Yes. On the four main issues that I  
20 brought up regarding the sleep deprivation, the starvation, the  
21 freezing cold, and the loudspeakers, I think these do greatly  
22 affect my ability to assist at all in my case. For example,  
23 yesterday, I didn't get lunch at all. When I'm not fed, I  
24 don't have sustenance, I can't -- it's very difficult to work.  
25 The same with sleep deprivation. One of the reasons that I

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1 leave early as well from the SCIF is that I'm so exhausted  
2 during the day. And these four issues are very, very critical  
3 to me that I think if you're not going to address them, I can  
4 no longer represent myself and I would be focusing my time on  
5 resolving those four issues because, Judge, I mean, it's not a  
6 joke. This is very difficult place to work when I can't even  
7 sleep. I can hardly get enough food. During the day, I'm  
8 starving all the time. I'm focusing all my time on these types  
9 of things instead of being able to work on my case. I think  
10 the Court is well within its jurisdiction to resolve these four  
11 issues, and like I said, if not, there's no way I can represent  
12 myself, if I can't have these issues resolved.

13 THE COURT: All right. If it gets to that point, you  
14 can certainly raise the issue and we'll address how to deal  
15 with it in your case, but as far as I can tell, that's  
16 demonstrably false. Since the last conference you have  
17 filed -- honestly, I have lost track of how many things you  
18 have filed. But I think you have filed ten standalone motions  
19 alone. Frankly, it's a staggering amount of work product for  
20 anyone, but given the things that you're saying, it just defies  
21 credibility to say that you're unable to meaningfully work on  
22 your case, given the amount of things that you're producing and  
23 filing.

24 THE DEFENDANT: Just because I'm able to do these  
25 things and push myself and persevere, I don't think that's a



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1 reason to say that I'm not adversely affected by these issues.

2 I mean -- I mean honestly --

3 THE COURT: Mr. Schulte.

4 THE DEFENDANT: -- be able to eat and not have --

5 THE COURT: Mr. Schulte, I understand.

6 THE DEFENDANT: -- and not be deprived of sleep, I  
7 don't see why the Court thinks that this is such a big deal  
8 that it can't, it honestly can't address. These are just  
9 humane issues. I mean I'm not asking for the moon on these  
10 four issues. I'm literally just asking for food, to sleep and  
11 not be freezing all the time.

12 THE COURT: Mr. Schulte, I have a filing from the  
13 government which seems to take a different issue of the way in  
14 which you've been treated. My point is I see no evidence that  
15 it is affecting your ability to prepare your case; that is my  
16 only authority to address in this case. Given that, I don't  
17 think these are issues that I can or should address, and I  
18 don't plan to address them, and I don't expect to see further  
19 filings on them. I think that you have other means by which to  
20 address them. As far as I can tell, you're able to and you may  
21 avail yourself of that. The government, for that reason it may  
22 be in their interest to try and address them with the MDC and  
23 try and ensure that some of these problems are addressed, and I  
24 would urge them to do that, but the bottom line is these are  
25 not issues that I have the authority to even address. So

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1 that's the final word on the matter and that's my ruling on the  
2 matter.

3 With that, let's proceed to the next category. These  
4 are substantive motions, most of which I have rulings on, so  
5 let me proceed one by one on that.

6 The first is Mr. Schulte's motion for bail.

7 On October 21, the government filed its opposition;  
8 that's at ECF No. 562. Mr. Schulte filed his reply on November  
9 13; ECF No. 588. The motion is denied substantially for the  
10 reasons set forth in the government's opposition.

11 First, to the extent that Mr. Schulte seeks to reopen  
12 the bail hearing, pursuant to Section 3142(f), he fails to  
13 demonstrate that there is information that "was not known to"  
14 him at the time of the earlier bail determination. Moreover,  
15 any such new information is not material, as there is  
16 overwhelming evidence supporting Judge Crotty's prior findings,  
17 made in the context of both the bail determination and his  
18 denial of Mr. Schulte's motion to lift the SAMs, that  
19 Mr. Schulte poses a danger to the community, including, but not  
20 limited to, his commission of sexual assault, his receipt and  
21 possession of child pornography, evidence of his involvement in  
22 the sophisticated theft and dissemination of highly classified  
23 information, his violations of protective orders, and his  
24 continued disclosures and attempted disclosures of classified  
25 information, even from jail.

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1           Mr. Schulte's argument that the length of his  
2           detention has become unconstitutionally excessive has more  
3           force, if only because he has now been detained for almost four  
4           years, which is indisputably a long time, and, absent bail,  
5           that time is likely to be much longer come trial. Again, as  
6           the Second Circuit noted in *United States v. El-Hage*, "the  
7           length of detention alone is not dispositive and will rarely by  
8           itself offend due process." 213 F.3d 74, 79 (2d Cir. 2000).  
9           Moreover, as in *El-Hage*, "the duration of the detention is not  
10          wholly unprecedented, especially for a complex case" -- that is  
11          from the same page, and this is certainly a complex case.  
12          Indeed, given the nature of the charges, the nature of the  
13          evidence, and the circumstances surrounding Mr. Schulte and his  
14          detention, it is among the most complex criminal proceedings  
15          that I am aware of.

16                 In any event, the other three factors that a court  
17          must weigh under *El-Hage* -- (1) the extent of the prosecution's  
18          responsibility for delay of the trial, (2) the gravity of the  
19          charges, and (3) the strength of the evidence upon which  
20          detention was based -- *i.e.*, the evidence of risk of flight and  
21          dangerousness; see 213 F.3d at 79 -- weigh against Mr. Schulte.

22                 First, Mr. Schulte's assertions notwithstanding, the  
23          government is not responsible for the length of his pretrial  
24          detention. That is largely due to the extraordinary complexity  
25          of the case and the evidence and the procedures required by

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1 CIPA; the pandemic, which not only delayed retrial but also  
2 hindered Mr. Schulte's ability to prepare for retrial; and  
3 Mr. Schulte's own perhaps inadvisable decision to go *pro se*.

4 Second, Mr. Schulte's casual assertions aside, the  
5 charges -- both the espionage charges, which involve the  
6 alleged theft and dissemination of some of our nation's most  
7 closely guarded secrets and the child pornography charges --  
8 are exceptionally serious.

9 And finally, as I previously discussed, the strength  
10 of the evidence upon which detention was based -- that is, the  
11 evidence of dangerousness -- is overwhelming. And for what  
12 it's worth, that factor is not concerned with the strength of  
13 the evidence generally but with the strength of the evidence  
14 upon which detention was based. But even if the strength of  
15 the evidence were a concern, in this context and with the  
16 caveat that I'm just beginning to get my head around the full  
17 record in this case, the evidence in this case seems strong,  
18 even if it is largely circumstantial.

19 Accordingly, the motion for bail is denied.

20 Moving to the motion to dismiss Counts Three and Four,  
21 at ECF Nos. 597 and 599, Mr. Schulte's protestations to the  
22 contrary notwithstanding, his motion is a paradigmatic example  
23 of a motion that "raises a factual dispute that is inextricably  
24 intertwined with a defendant's potential culpability," which  
25 cannot be resolved on a Rule 12(b) motion. *United States v.*

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1     *Sampson*, 898 F.3d270, 281 (2d Cir. 2018). Yes, there is an  
2     exception to that rule for when the government has made a full  
3     proffer of the evidence that it plans to present at trial. See  
4     *Sampson* at 282. But that exception is "extraordinarily  
5     narrow," and it does not apply here. That is from the same  
6     page. Contrary to Mr. Schulte's argument, the first trial does  
7     not constitute a full proffer within the meaning of the *Sampson*  
8     exception. For one thing, the charges are not identical in  
9     that they have been superseded and changed; for another, the  
10    government represents that it anticipates introducing  
11    additional evidence at the retrial. See *Gov't Br.* (ECF No.  
12    586, at 9 n. 2).

13           Mr. Schulte's as-applied First Amendment challenge,  
14    meanwhile, is without merit. For one thing, he is arguably  
15    estopped from making the argument by his counsel's earlier  
16    concession that the Espionage Act may constitutionally apply to  
17    him. See ECF No. 284, at 8. But even without that concession,  
18    the argument is without merit, substantially for the reasons  
19    stated by the court in *United States v. Kim*, 808 F.Supp.2d 44,  
20    57-57 (D.D.C. 2011). As that court explained in addressing a  
21    charge under Section 793(d): "By virtue of his security  
22    clearance, defendant was entrusted with access to classified  
23    national security information and had a duty not to disclose  
24    that information. He cannot use the First Amendment to cloak  
25    his breach of that duty." *Id.* at 57 of the court's opinion.

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1           Finally, the defendant's argument -- made in a  
2 supplemental letter dated November 15, 2021, at ECF No. 599 --  
3 that Count Three must be dismissed in light of Judge Crotty's  
4 Rule 29 decision is without merit, substantially for the  
5 reasons set forth in the government's reply at ECF No. 616.  
6 Applying the *Blockburger* test, the relevant offense in the S2  
7 indictment and Count Three in the S3 indictment do not qualify  
8 as the "same offense" for purposes of double jeopardy since  
9 each has an element that the other lacks. Moreover, Judge  
10 Crotty found that the evidence was insufficient only as to one  
11 theory of conviction -- relating to Hickok, ECF No. 581, at 25.  
12 He explicitly found that the evidence was sufficient to sustain  
13 the government's other theories for conviction.

14           Accordingly, the motion to dismiss must be denied.

15           I recognize that that leaves unresolved some clear  
16 disagreements between the parties -- most prominently, whether  
17 information that is in the public domain can qualify as  
18 national defense information. I do not need to resolve that  
19 disagreement today, and it is better left to motions *in limine*  
20 and/or jury instructions when the record will be clear and the  
21 issues more crystallized.

22           Finally, in light of the fact that I granted  
23 Mr. Schulte authorization to file a motion with respect to the  
24 alleged attorney-client privileged materials, I do not intend  
25 to address his arguments with respect to the malware article

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1 being privileged since that is within the scope of the motions  
2 that he will be filing, and I'll defer it to that time.

3 In light of that decision, moving on to the next item,  
4 which is the CIPA Section 5 notice, ECF No. 595, in light of my  
5 denial of the motion to dismiss, Mr. Schulte's CIPA Section 5  
6 notice is denied as moot in part and as premature in part.  
7 That is, to the extent that he seeks to use certain exhibits in  
8 connection with his motion to dismiss, the request is obviously  
9 moot, the point of my prior ruling. To the extent that he  
10 seeks to use them at trial, I think it makes more sense to take  
11 the issue up with Mr. Schulte's other CIPA Section 5 issues, at  
12 which point the record will be clearer and more developed.

13 Accordingly, to the extent that Mr. Schulte seeks to  
14 use the evidence at trial, the request is denied without  
15 prejudice to renewal in conjunction with his comprehensive  
16 omnibus Section 5 requests that are due by the deadline that I  
17 previously set.

18 The next item is the order to show cause that I issued  
19 with respect to the cell phone search evidence. The  
20 government's submission is at ECF No. 615. Mr. Schulte's  
21 response is at 640. Upon review of those submissions, I  
22 conclude that there is no basis to suppress the fruits of the  
23 search of the cell phone. I conclude that this case is unlike  
24 *Smith*, the case that I had previously cited, for two  
25 significant reasons.

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1 First, given that the government sought and obtained  
2 from Magistrate Judge Moses a warrant within hours of the  
3 initial seizure, the seizure itself was ratified by a judicial  
4 officer within a relatively short time. That addresses the  
5 *Smith* court's concern that delay "prevents the judiciary from  
6 promptly evaluating and correcting improper seizures, 967 F.3d  
7 at 205, and also reduces Mr. Schulte's legitimate possessory  
8 interest.

9 Second, I am persuaded -- substantially for the  
10 reasons set forth in the government's memorandum -- that the  
11 cell phone had independent evidentiary value, and thus, the  
12 government was entitled to retain it pending trial. The fact  
13 that, as Mr. Schulte argues in his reply, the government could  
14 have obtained the information provided by the phone from other  
15 sources or in other ways doesn't change the fact that it has  
16 independent evidentiary value. *Smith's* holding is limited to  
17 evidence that has no evidentiary value independent of the  
18 search of its contents. See 967 F.3d at 205, 209.

19 Accordingly, on both those grounds, *Smith* is  
20 distinguished and distinguishable.

21 Second, and in any event I'm persuaded the good faith  
22 exception would apply. Under that exception, "evidence  
23 obtained by officers in objectively reasonable reliance on a  
24 warrant subsequently invalidated by a reviewing court is not  
25 generally subject to exclusion." *United States v. Leon*, 468



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1 U.S. 897, 920-21 (1984) *United States v. Raymonda*, 780 F.3d  
2 105, 118 (2d Cir. 2015). There is no dispute that the relevant  
3 facts were disclosed in the second warrant application that was  
4 granted by Magistrate Judge Cott, and that warrant was not "so  
5 facially deficient that reliance upon it [was] unreasonable."  
6 *Raymonda*, 780 F.3d at 118. Mr. Schulte does not cite, and I  
7 have not found, any case prior to *Smith* that would even  
8 plausibly suggest that the delayed search would be a basis for  
9 suppression, and *Smith* was decided after the second search and,  
10 by the way, also applied the good faith exception in its own  
11 right. Moreover, as discussed, even under *Smith*, it was  
12 reasonable to believe that the government was entitled to  
13 maintain the phone given its plausible independent evidentiary  
14 value.

15 The defendant's arguments pursuant to Rules 16 and 41  
16 are without merit and rejected. Mr. Schulte's request to file  
17 a new motion to suppress the March 2017 search warrant is  
18 denied. That warrant was not executed, as I mentioned earlier,  
19 and while it certainly provides support for my decision that  
20 the fruits of the eventual search need not be suppressed, my  
21 decision does not depend on it. So any motion to suppress that  
22 warrant would be academic.

23 Ms. Colson, are you --

24 MS. COLSON: I'm sorry, your Honor. I have another  
25 application. I didn't understand that this would go on for so

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1 long. My apologies.

2 THE COURT: All right.

3 MS. COLSON: Ms. Shroff is able to stay.

4 THE COURT: All right. Very good.

5 MS. COLSON: Thank you.

6 THE COURT: Why don't you step out, and I'll continue.

7 The next motion is the motion for internet access, ECF  
8 No. 557. That motion is denied. I do not dispute the  
9 importance of the internet in today's world or its desirability  
10 in conducting litigation and preparing for trial, but put  
11 simply, there is no authority for the proposition that pretrial  
12 detainees generally, or those who make the decision to  
13 represent themselves specifically, let alone those under SAMs,  
14 are entitled to such resources. To the contrary, the authority  
15 I cited earlier -- *Spates; Byrd; Benjamin*; and so on -- stand  
16 for the proposition that any right of access to legal resources  
17 owed to pretrial detainees "is satisfied when the presiding  
18 courts merely offer such detainees appointed counsel or standby  
19 counsel." *Stanko*, at \*2-3, citing various cases.

20 Here, as I noted earlier, Mr. Schulte has been  
21 provided with not one but two highly qualified and dedicated  
22 standby counsel, who have full access to the internet and all  
23 it has to offer. Mr. Schulte's desire that they do nothing  
24 other than handle logistics is irrelevant. The fact of the  
25 matter is that he has access to them, and they're available to

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1 him and they satisfy whatever rights he may have in that  
2 regard.

3 Moreover, as noted, he does have regular access to the  
4 law library, even if it's not as much as he would like; two  
5 full days of access to the SCIF per week, with expanded hours,  
6 pursuant to my prior order; and other accommodations that are  
7 not made for the average pretrial detainee. I would note as  
8 well that Judge Crotty clearly warned Mr. Schulte that going  
9 *pro se* is not a back door way to undermine the SAMs order or of  
10 obtaining access to information or resources to which he wasn't  
11 entitled, and Mr. Schulte specifically affirmed that he wanted  
12 to proceed *pro se* whether or not he was granted greater access  
13 and resources.

14 Finally, I would note that even without access to the  
15 internet, Mr. Schulte has, as I have said several times, been  
16 able to file a veritable flood of motions and other  
17 submissions, so many that I have lost count myself. See, e.g.,  
18 *United States v. Helbrans*, 2021 WL 4778525, at \*14-15 (S.D.N.Y.  
19 Oct. 12, 2021) (rejecting then *pro se* defendants' contentions  
20 that they needed additional resources in order to prepare their  
21 defense for similar reasons).

22 In short, there is no right, under the First, Fifth or  
23 Sixth Amendments, to internet access for pretrial detainees  
24 generally or for *pro se* defendants specifically. And there are  
25 particularly good reasons -- given the nature of the charges

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1 here, the history of the case, and the SAMs -- set forth in  
2 Judge Crotty's prior rulings on those issues not to allow  
3 Mr. Schulte internet access. So that motion is denied.

4 Next, I'll take up the motion for reconsideration in  
5 my order at ECF No. 622 regarding essentially ordering the  
6 government to declassify certain information. I said earlier  
7 that I would revisit that issue here, and I'll do that now.

8 I want to be clear, I'm not prepared to hold, at least  
9 at this juncture, that courts have no authority to review  
10 classification decisions of the executive branch. To the  
11 extent that some of the cases cited by the government in its  
12 letter on this issue, at ECF No. 619, holds or suggests that  
13 that is the case, it is hard to square with the fact that there  
14 are at least two contexts in which courts do have authority to  
15 review classification decisions; namely, cases challenging  
16 pre-publication review such as *McGehee v. Casey*, 718 F.2d 1137,  
17 1148-49 (D.C. Cir. 1983), and FOIA cases, *see, e.g., Halperin*  
18 *v. FBI*, 181 F.2d 279, 289 (2d Cir. 1999); *Weberman v. Nat'l*  
19 *Sec. Agency*, 490 F.Supp. 9, 13 (S.D.N.Y. 1980).

20 At the same time, I agree with the government that  
21 these contexts are very different than the context of this  
22 case, a criminal case governed by CIPA. *See, e.g., ACLU v.*  
23 *Dep't of Just.*, 681 F.3d 61, 72 & n. 9 (2d Cir. 2012) (noting  
24 that "procedures of CIPA contrast sharply with those of FOIA").  
25 Moreover, I am inclined to agree with the government that CIPA

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1     itself does not grant or contemplate judicial authority to  
2     declassify information that the executive branch has deemed  
3     classified.  Indeed, the text and instruction of the act  
4     suggest to me pretty strongly that courts do not have that  
5     authority, at least as a matter of statute.

6             In my view, therefore, defendant would likely have to  
7     persuade me that declassification is necessary to protect his  
8     constitutional rights, and on the present record, he has not  
9     done so.  For starters, I'm inclined to think that the  
10    comprehensive scheme established by CIPA adequately protects  
11    his Fifth and Sixth Amendment rights, including the right to  
12    due process and to present a defense, and of course, CIPA has  
13    been upheld repeatedly by courts against challenges to its  
14    constitutionality.

15            I suppose that could change as we get closer to trial  
16    and it becomes clear what evidence Mr. Schulte wishes to use  
17    and how he wishes to use it.  Not for nothing, by that point, I  
18    will also have a better handle on what is classified and why  
19    and, thus, a better ability to assess the parties' competing  
20    arguments.  But certainly at this point in the litigation, I do  
21    not think that Mr. Schulte has come close to making that  
22    showing.

23            Nor has he demonstrated that the First Amendment calls  
24    for reviewing the executive branch's classification  
25    determinations.  He is not seeking to publish information that

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1 the executive branch has deemed classified, in which case there  
2 is an established administrative review process to challenge  
3 classification decisions and the right to judicial review.  
4 Instead, we are dealing here with court filings, and he cites,  
5 and I have found, no authority for the proposition that a party  
6 to litigation has a First Amendment right to file documents on  
7 the public docket, let alone to do so over the government's  
8 claim that they contain classified information. There is, of  
9 course, a First Amendment right of public access to judicial  
10 documents, but Mr. Schulte does not invoke it, and in any  
11 event, he himself has access to the classified information, so  
12 he has no standing to invoke that right.

13 In short, to the extent that I have authority to  
14 review or second-guess the executive branch's determinations of  
15 classification, on which I reserve judgment, I decline to  
16 exercise it at this stage of the litigation. That said, I do  
17 want to say and/or reiterate two things.

18 First, I agree with Mr. Schulte that some of the  
19 government's classification determinations are, at least on  
20 their face, a little hard to understand. For instance,  
21 information that the government has in prior filings portion  
22 marked as unclassified and information that is generally  
23 public, with some caveats, and I would strongly urge the  
24 government to be careful in its determinations and to ensure  
25 that information and filings are not being overclassified even

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1 if there is no bad faith in the government's determinations. I  
2 trust that the government will press the classifying authority  
3 on that point and make my views on it known.

4 I would also note that such overclassification does  
5 come at a cost not only with respect to public access, of  
6 course, but also it puts Mr. Schulte and standby counsel in an  
7 unenviable position. This reverts to the discussion we had  
8 earlier, but it is hard to know in some instances what is and  
9 isn't classified. I'm not sure that's always the case, and I  
10 reiterate that counsel and standby counsel and Mr. Schulte are  
11 to take more care on that front, but it does seem to me that  
12 there is occasionally a sort of trap -- not only for the  
13 unwary, but even the wary -- and that's not fair. It  
14 undermines the force of the protective order and other orders  
15 of the Court, and it's hard to insist that Mr. Schulte and  
16 standby counsel take care not to file classified things  
17 publicly if it's impossible to tell *ex ante* what is and isn't  
18 classified. Again, that doesn't necessarily apply to  
19 everything that has been filed here, but I just want to  
20 underscore that.

21 So the bottom line is that I will not reconsider my  
22 prior order at this time. I may, however, revisit the issue  
23 later as we get closer to trial and I have a better  
24 understanding myself of what is and isn't classified and why,  
25 particularly if I conclude that it does infringe on

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1 Mr. Schulte's right to a fair trial in some demonstrable way.

2 I believe that that resolves all of the outstanding  
3 pending motions. My intention is to issue a bottom-line order  
4 memorializing all of these rulings as well as the new deadlines  
5 and schedule and so forth so that everybody's on the same page  
6 with respect to that.

7 Any other issues?

8 Mr. Denton.

9 MR. DENTON: Your Honor, just for the record, with  
10 respect to the last point you made about the classification  
11 order, the government has shared the Court's previous order  
12 with the classifying authority and discussed your Honor's  
13 footnote in that, which made a number of these points at some  
14 length. We will also ensure that we also share the transcript  
15 of this proceeding and convey those concerns to them as well.

16 THE COURT: All right. I don't think the footnote was  
17 especially long, but I take your point nevertheless.

18 Mr. Schulte, anything else that you wish to raise?

19 I do want to discuss when we should reconvene, and  
20 obviously, there may be an application under the Speedy Trial  
21 Act, but anything aside from that?

22 THE DEFENDANT: I don't think so, no.

23 THE COURT: All right. I'd be inclined to reconvene  
24 in either mid-January or early February.

25 Mr. Denton, do you have a view on that?



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1 MR. DENTON: Not particularly, your Honor. It might  
2 make sense to do early February, after the defendant's motions  
3 are filed, but I think the government's happy either way.

4 THE COURT: All right. I think that probably makes  
5 sense. Why don't we plan to reconvene at 2:30 on Valentine's  
6 Day, February 14.

7 Does that work, Mr. Denton?

8 MR. DENTON: Yes, your Honor.

9 THE COURT: Mr. Hartenstine, does that work for you?

10 MR. HARTENSTINE: Yes, your Honor. That works for me.

11 THE COURT: All right.

12 Mr. Schulte, I assume it works for you.

13 Ms. Shroff, does that work for you?

14 MS. SHROFF: May I trouble you to just ask what day of  
15 the week that is?

16 THE COURT: Monday.

17 MS. SHROFF: That's fine.

18 THE COURT: All right. Monday, February 14, at 2:30.

19 Mr. Denton, is there an application under the Speedy  
20 Trial Act?

21 MR. DENTON: Yes, your Honor.

22 In light of the complexity of the case and the need  
23 for the defendant to prepare and file a variety of motions, the  
24 government would move to exclude time under the Speedy Trial  
25 Act until February 14.

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1 THE COURT: Mr. Schulte, any objections?

2 THE DEFENDANT: No objection.

3 THE COURT: I will exclude time under the Speedy Trial  
4 Act between today and February 14, 2022. I find that the ends  
5 of justice served by excluding that time outweigh the interests  
6 of the defendant and the public in a speedy trial in view of  
7 the complexity of the case, the many different issues that  
8 we've discussed today that require further discussion,  
9 resolution, and the motions that Mr. Schulte is going to be  
10 preparing and filing on January 28.

11 I am assuming, in light of my rulings today,  
12 including, but not limited to, the conditions-of-confinement  
13 issues, my ruling on the substantive motions, my permission to  
14 Mr. Schulte to file additional motions and the setting of one  
15 deadline for the filing of omnibus motions, that there will be  
16 fewer filings between now and the next pretrial conference.

17 Obviously, Mr. Schulte, you're free to file things if  
18 you think that there is something that you should file, but I  
19 would just urge you to heed my admonition earlier and not  
20 repeat things from one submission in another just to ease the  
21 burden on counsel, standby counsel, the government, and me, and  
22 also just begin to be able to focus on preparing for trial.

23 With that, everybody stay safe and healthy, and happy  
24 holidays to everyone. We are adjourned. Thank you very much  
25 for your patience. (Adjourned)